THE

MONTHLY LAW REPORTER.

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CRIME AND CRIMINAL LAW IN MASSACHUSETTS.[1]

We believe that it will not be going far out of our way as journalists of the law, to invite the attention of our readers to the latest statistics of crime and criminal punishments in Massachusetts; and taking them as the text for some observations on the criminal legislation and jurisprudence of that State, to solicit the interest and aid of our readers and contributors in like expositions of criminal matters in other parts of the Union. We cannot promise a very practical article to the civil practitioner; one, for instance, that would help him to advise upon his next consultation. But if having some leisure at this dull season of what are, or what ought to be, the legal holidays, he has any inclination for a stroll into the swamp of criminal law, we shall be pleased to show him the discoveries which we have made in our latest walks, and help him to the conviction, if possible, that if he would oftener take his exercise in the same direction, he would

[1] Abstract of Returns of the Keepers of Jails and Overseers of the Houses of Correction for the year ending November 1st, 1852. Prepared for the use of the Legislature by the Secretary of the Commonwealth. Boston: White & Potter, Printers to the State, 1853.

Annual Report of the Board of Inspectors of the Massachusetts State Prison, September 30th, 1852, together with the Annual Reports of the Officers of the Institution. *Ib.*

Annual Report of the Attorney-General of the Commonwealth of Massachusetts for 1852. *Ib.*

find some as great — we think, much greater — subjects for his meditations, than belong to the daily beat of his civil avocations.

The documents which we intend first to notice, quoted in the note to the caption, are the usual annual publications of the State of Massachusetts, and furnish to her legislators and citizens the only information which they can obtain of the general working of her criminal laws and judicature. They are, we suppose, fair specimens of the mode of reporting upon such subjects throughout the Union. Indeed, with perhaps the exception of New York, we doubt whether they are not got up with more pains as to particulars, and more accuracy as to general results, than any other similar statistics of any State whatever. It is now some months since they were laid before the legislature, and were distributed for perusal through the usual channels of circulation. And yet surprising as we think we shall show their contents to be in comparison with like exhibits ten years back, we do not remember to have seen or heard a single comment upon their contents, either in the way of legislative discussion, or magazine or newspaper publication. Whether the people have passed them over with this neglect because they undervalued their accuracy, or whether the documents were thought to be so legal in their character that none but lawyers could appreciate them, we do not know; but certain we are, that if the statesmen and philanthropists of Massachusetts attached the importance to these returns which we think properly belongs to them, or which they ought to possess if their character for accuracy were what it should be, an interval of so many months would not have elapsed without public attention having been drawn to their contents most fully and most anxiously long before this.

But without further preface as to the character of these statistics, we print four tables which we have reduced from them with some pains, in order that our readers may see for themselves whether they bear on their face any such significant import as we have ascribed to them. We would premise that we do not at present vouch for the correctness of the originals, only for the accuracy of the compilation and reduction.

Table I. shows the total of commitments for crime, including drunkenness, and for drunkenness separately, to all the jails and houses of correction of Massachusetts,

during the last ten years. It is compiled from "Abstracts of Returns of Jails and Houses of Correction, prepared for the use of the Legislature by the Secretary of the Commonwealth."

TABLE I.

Year.	Total of Commitments.	Commitments for Drunkenness alone.
1843	3681	913
1844	3505	945
1845	4747	1976
1846	5755	2816
1847	6206	1721
1848	6901	2123
1849	8375	2507
1850	8761	3341
1851	9841	3850
1852	[1] 9353	3941

Table II. shows the average number in confinement in all the Jails and Houses of Correction of the State of Massachusetts on a given day, (Nov. 1st,) during the last ten years, as also the average number during the whole year for the last five years, taken from the same source as the last.[2]

TABLE II.

	November 1st.			Average during the whole year.	
Year.	In Jail.	In H. Cor.	Total.	In Jail.	In H. Cor.
1843	136	441	577		
1844	127	426	553		
1845	182	510	692		
1846	179	564	740		
1847	187	543	730		
1848	263	699	962	220	554
1849	357	710	1067	253	614
1850	322	790	1112	284	719
1851	304	864	1168	276	810
1852	277	781	1058	290	825

Table III. shows the annual commitments and recommitments to the state prison of Massachusetts, as also the

[1] The falling off of the last year mainly arises from the County of Suffolk, with which the mode of reporting in consequence of the change of prosecuting officers and the diminished number of license-law prosecutions have doubtless much to do.

[2] The average for the whole year is only given for the last five years, because it is only during that time that the tables have been so kept as to furnish the information.

average number in confinement each year, for the last ten years, as compiled from the Annual Reports of the Warden and Inspectors.

TABLE III.

Year.	Commitments.	Recommitments.	Average number in confinement.
1843	97	17	270
1844	105	16	271
1845	96	16	284
1846	78	17	262
1847	123	19	262
1852	122	21	284
1848	191	20	320
1849	221	26	411
1850	169	18	466
1851	177	12	483

Table IV. shows the number of prosecutions, convictions, and acquittals, throughout the State of Massachusetts for the last ten years, as compiled from the Reports of the Attorney-General, and Abstracts of the Reports of the District Attorneys made in the office of the Secretary of State.

TABLE IV.

Year.	Prosecutions.	Convictions.	Acquittals.
1843	1690	777	169
1844 [1]			
1845 [1]			
1846	2279	1038	109
1847	3277	1415	143
1848	3307	1491	126
1849	3545	1677	173
1850	3772	1956	222
1851	4670	2108	269
1852	3588	1443	209

We think that even a hasty glance at these figures must have occasioned some surprise to our readers. According to the first table, an army of 9353 criminals, or, — what may be fairly stated in round numbers according to the average mode of keeping the estimate of the previous year, — an

[1] Returns imperfect in consequence of omissions from one or more districts. The law abolishing the office of attorney-general and transferring the duty of digesting the reports of the district attorneys to the State Department took effect, May, 1843.

army of 10,000 criminals, every year crossing the threshold of Massachusetts jails and penitentiaries! (England with her population of 18,000,000, if the same basis of comparison has been taken, had less than three times as many, or only 27,510, in 1852, according to the last general returns.[1]) An increase of crime in the State during the last ten years, if the commitments are to be taken as a fair evidence of that fact, from 3681 in 1843, to 9353 in 1852! And drunkenness, criminally cognizable, swollen during the same period, from 913 subjects of imprisonment, to 3941! (The population of Massachusetts by the census was 737,700 in 1840, and 994,656 in 1850, or an increase of only 36 per cent.; a fair ratio of increase, we suppose, to apply to the period, 1843–52.)

Table No. II. — to take only the first striking result — exhibits an increase of prisoners in the jails and houses of correction, on the first day of November, from 577 in 1843, to 1058 in 1852!

Table No. III. shows an average of inmates in the state prison of 483 in 1852, against 270 in 1843! And Table No. IV. sets down the total of prosecutions for the higher courts and for the higher crimes at 3588 in 1852, against 1690 in 1843; while the convictions average in nearly the same ratio, of 1443 in 1852, to 777 in 1843!

Do these official statements really and truly indicate that Massachusetts during the last ten years, while her population has probably increased only in the ratio of ten to seven, has doubled or trebled her number of criminals? And are the frightful figures in regard to drunkenness and the general total of commitments at all reliable?

In answer to these questions, we will proceed to point out the kernels of truth which we think we have been able to find among the chaff before us, and to give as good a judgment as we can upon the present relative amount of crime and its mode of prosecution and punishment in the Commonwealth.

In the first place, we set very little value on most of the statistics embraced in the returns of the jails and houses of correction. Those in regard to drunkenness, in particular, we are sure are made up in a manner to give them

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[1] See Law Magazine for May, 1853, article IX.

very little importance as a criterion of criminal delinquency. Thus having analyzed those for the County of Suffolk, we found the following results for the past ten years.

TABLE,

Showing the Commitments for Drunkenness to the Jail and House of Correction for the County of Suffolk for the past ten years.

Year.	Com'ts to Jail.	Com'ts to H. Cor.	Total.
1843	110	314	424
1844	162	286	448
1845	831	393	1224
1846	1304	518	1822
1847	320	428	748
1848	417	471	888
1849	400	502	902
1850	1172	460	1632
1851	1567	454	2021
1852	1557	481	2038

Such inequalities and irregularities as these figures show, must necessarily arise from a difference in the system of keeping the tables, we at once concluded. And on personal inquiry of the jailer for that county, we found that, in order, as he expressed himself, to show the results more fairly for the Temperance question, he had (since the period of the great rise, 1849,) made return of all persons committed to the jail for drunkenness; — as well those lodged there merely for detention by the watch as those committed on a warrant; whereas previously only the latter class of commitments had been taken into account. Now, as the County of Suffolk furnishes half the criminal drunkenness of the State according to the returns, we need pause no longer on this question of comparative increase of crime in that department.

Again, looking at the sum totals of commitments to all the jails and houses of correction, collectively, for the last ten years, according to Table No. I., we perceive that these computations of drunkenness go to swell the large aggregates already commented on. Laying them aside, then, — as indeed they ought to be for strictly criminal purposes, however accurate, — we have a much more reasonable exhibit of the crime and criminal procedure of the State. With this subtraction, the average of criminal commitments for the three first years of the period taken, (1843–5,)

would bear the ratio to the last three years of the same period (1850–2,) of 2700 to 5600 per year. Doubtless this result is a fair indication of general tendencies. But when we come to inquire into particulars under the head of separate crimes, we attach only very slight weight to any thing which these tables can afford. Thus, no separate head was kept for murder, so that the reader could find how many commitments had been made under that head, till 1848; and since that time the two heads of homicide and murder have been maintained separately, without any thing to indicate whether the homicides were not also murders. In like manner there has been no separate head of arson, till since the period last named; and we take it for granted that no uniform rule has been followed by the jailers and masters of the houses of correction in classifying the burning of other buildings than houses, under that head, or under the general title of "other offences." So, as to burglary, we are morally certain that the jailers have not agreed among themselves whether to limit it to house-breaking, or to include also shop-breaking, &c. Robbery has disappeared altogether from the classification; though for a while it had a representative in the returns under the head of "highway robbery,"—a nomenclature unknown to Massachusetts statute or common law.

But we will not waste words in decrying these returns. We suppose their only summaries of a reliable character are the bare number of prisoners remaining in confinement on a given day, about which there cannot be much room for mistake, and the average of numbers confined during the year, as to which the calculation is one easily made. Perhaps also the distinctions of age, sex, and color, and the statistics of certain unmistakable crimes, like perjury and rape, may be of some consequence. These returns however are highly important, as bearing upon the question of increase of crime in general, or increased vigilance and severity in its punishment, as we shall presently have occasion to notice.

Passing to Table No. III., the statistics of the state prison, we have no doubt of their reliable accuracy to the extent to which we have quoted them; viz., the number of annual commitments, particularizing what portion are recommitments, and the average number for the year. As this institution receives all the male subjects of heavier punishment throughout the State, including also the com-

mutations of capital sentences, it serves as an accurate thermometer of the amount of aggravated crime in the State. It enables one also to conjecture with more probability as to the amount of lighter crime; the connection between the different grades of offences being almost as natural and intimate as that between the apex and base of a pyramid. Looked at in either point of view, for its positive or its relative indications, we think this table contains matter which should put the people of Massachusetts upon thinking. At any rate, in connection with the reliable deductions from the other tables, it tells, to our thinking, a fearful tale of the growth and prevalence of crime within her territory. One hundred and seventy-seven new commitments and an average of 483 resident convicts in the year 1852, against only 97 commitments and 270 residents in 1843! — or, taking averages of three years at the two extremities of the ten years, 189 average annual commitments in 1850–2, against only 99 from 1843–5; and 453 resident convicts in 1850–2, against only 275 in 1843–5! If population, as we before supposed, has increased only 36 per cent. in Massachusetts, here we have solid demonstration of an increase of crime of the darkest hue, of upwards of 80 per cent.

But pausing at this stage of our examination of the tables, to bring together the other collateral evidence bearing upon the question of the growth of crime, we feel ready to advance the statement as a whole, *that the amount of crime in Massachusetts has just about doubled within the last ten years.*

We are well aware that we are proceeding upon the ground that punishment of crime is to be taken for proof of its existence; that because so many prisoners have been sentenced or committed to the state prison and jails, that, therefore, so much crime as they are charged with has been committed. But is not this substantially accurate? Doubtless more murders are committed than are punished. But will not the sentences for murder furnish pretty good evidence that so many murders *at least* have been committed? And then, if it be said that crime is punished with more certainty in one jurisdiction than another, — in Massachusetts, for instance, than in Texas, — and, therefore, that any comparison, to be accurate, must take into account the character of the prosecution, we have to reply that we are only comparing Massachusetts now with herself; and that we are

not aware of any sensible difference between the activity and vigilance of her prosecuting officers and the willingness to convict on the part of her juries now, and the characters of these two departments of the court in the same respects, ten years since.

We have then, for proof of our position that the amount of criminal offences has nearly doubled within the last ten years, evidence from three independent sources. First, beginning with the number of prosecutions in the higher courts, according to Table IV., whose accuracy in other respects we shall presently notice, but whose data in this respect we take to be generally true, we have 1690 prosecutions and 777 convictions in 1843, against 3588 prosecutions and 1443 convictions in 1852; a ratio very nearly of one to two, as we have above supposed. Then, looking at the commitments to the jail, the place where all these subjects of prosecution have at some time been *detained*, we have for a specimen of a given day, (November 1st,) 136 prisoners in confinement in 1843, against 277 in 1852; little *less* than one to two. And, lastly, looking at the jails and houses of correction in the aggregate, and the state prison separately, — the three institutions which receive substantially all the *sentenced* convicts, — we have an aggregate of 577 in confinement in the jails and houses of correction November 1st, and an average of 270 in the state prison, through the year, of the year 1843, against 1058 in the jails and houses of correction, and 483 in the state prison for the corresponding period of the year 1852; very nearly the ratio of one to two still maintained.

We should be happy to run these general comparisons out into examinations of particular offences. Thus, our readers, *i. e.* — who have taken interest enough in the subject to read thus far, — would doubtless be interested to learn how stands the comparison of the crime of murder and some other of the higher offences for the period in question. But will it be believed, that *no published tables exist in Massachusetts, by which it can be ascertained how many persons have either been arrested, tried, convicted, or executed, in that State during the last ten years, for any capital crime?* We speak with reflection, when we defy any one of her legislators or lawyers, — her attorney-generals, district attorneys, sheriffs, jailers or masters of houses of correction, — to produce such. Laborious compilations of stuff of some kind exist among the documents which we have under-

taken to examine; but nothing to answer so elementary a question in criminal statistics as that which we have just mentioned.

And this leads us to make a few comments on the last class of documents which we propose to notice under specimen in Table No. IV. — the reports of the Attorney-general and District Attorneys.

In the hands of lawyers, — able men and experienced criminal practitioners, such as have officiated as the prosecuting officers of Massachusetts, — one would suppose that the figures of criminal proceedings would be kept to some purpose. But we should be glad to know what purpose such a document as the one above quoted, bearing the title of "The Annual Report of the Attorney-General of the Commonwealth of Massachusetts for 1852," can serve to the interests of the State or the general student of criminal law?

We mean to attribute official delinquency to no one. On the contrary, looking at the circumstances under which the report was made up, we feel bound to state that the newly installed attorney-general could not, of course, undertake to report upon the criminal business of the Commonwealth which had been transacted before his official connection with it beyond the materials furnished him; and the retiring incumbent, (who, we may be pardoned for noticing with professional pride, has so lately received from the people of the Commonwealth, in his election to the highest office of the State, a flattering testimonial not only to the satisfactory discharge of the duties of his last official position, but to his whole public and professional career,) could do no more than leave behind him, as he has done, a detailed report of his own doings up to the time of quitting office. We feel bound also to add, that the ministerial reduction and compilation of the document seem to have been performed with pains-taking accuracy and fidelity, and that the whole shape of the report, in fact, is nothing different from what has been annually published for several years past. But we desire, if possible, to awaken attention to the want of aim and classification and system in reporting on criminal matters which now reigns supreme in Massachusetts, and to urge with all proper earnestness a thorough reform in the matter.

The results, summed up in the Attorney-General's Report for 1852, are exhibited in the following Table taken from the report itself:

"TABLE,

Showing the whole amount of the Criminal Business in the Commonwealth."

OFFENCES.	Prosecutions.	Convictions.	Acquittals.	Nol. Pros'd.	Still Pending.	No Bill.	Not Arrested.	Default on Recognizance.	COSTS.
Against the person, feloniously	83	36	8	6	10	19	2	2	$5,051 40
Ag'st the person, not feloniously	497	208	41	73	87	75	1	12	10,487 73
Ag'st property, with violence	241	149	8	11	34	23	11	5	5,831 60
Ag'st property, with't violence	851	382	72	53	168	134	17	25	22,813 58
Other Offences	1916	668	80	251	552	214	67	84	28,587 84
Total . .	3588	1443	209	394	851	465	98	128	$72,772 15

Now, who that is conversant with Massachusetts law (and *a fortiori*, how will it be with the people at large?) can form any, the slightest idea, what crimes are intended to be embraced under the heads, "Against the person feloniously," and, "Against the person not feloniously?" The nomenclature was bad enough before the passage of the law, 1852, ch. 37, making "any crime which now is or hereafter may be punishable by death or imprisonment in the state prison," a felony. But since the passage of that act, supposing the returns to be kept strictly conformable to it, who would be any wiser for the information that so many convictions have been had of offences which were or were not *liable* to punishment in the state prison? Why! in one of the most recent criminal law arguments before the full bench of the Supreme Court which we had the pleasure of attending, we remember to have heard the present accomplished attorney-general of the State, signify to the court his most deliberate opinion that the common-law powers of the court extended to sentencing to the

state prison.[1] So that under the head of crimes "Against the person feloniously," why should not we look for common assaults and batteries? And very plainly we should have to seek for adulteries there, now that state-prison offences are *ipso facto* felonies. How the compiler of these tables has dealt with adultery, bigamy, &c., since the law took effect, we have no means of ascertaining. Probably he was unable to distinguish in the reports themselves between the convictions before or after that period.

Then, of how little consequence is the only remaining division of offences into "Crimes against property with," or, "without violence?" For ourselves, we should be at a loss whether to embrace arsons, larcenies from the person, malicious mischief, and perhaps some other offences, under one head or the other. We are aware that the distinction is usually made in crimes' classification, and it is perhaps well enough in itself; but it is a mere generality, and fails to convey any definite intelligence to the law-maker or the people.

As to the summaries exhibited by the perpendicular divisions of the tables — viz., the number of prosecutions, convictions, &c., — they undoubtedly constitute general items of considerable interest, but quite unworthy, taken by themselves, of the name of criminal statistics, and quite inadequate even to the pains which we believe are already actually bestowed by the reporting officers upon their sepa-

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[1] We take the liberty of adding, that he seemed to have forgotten the advice which he was currently reported to have given to a judge of the Court of Common Pleas, upon the same subject, some years before. The occasion was a conviction of a New York lawyer (with some other person) in the Municipal Court, of the crime of a conspiracy to cheat a bookseller out of some *law-books* (!) The presiding justice, upon conviction, imposed a sentence for this common-law offence, of five years in the state prison. Upon some suggestion being made at the bar, which doubtless came to the ears of the learned judge, that a writ of error would be likely to be brought upon the judgment, he was reported to have asked the advice of Mr. Choate, and in accordance with his suggestion to have modified the sentence into one of imprisonment for the same term in the house of correction. At any rate, the change was made from the state prison to the house of correction.

We would add that a writ of error was ultimately brought upon the sentence as awarded, to test among other things the common-law powers of the court, and elaborately argued at Salem, November, 1845. After a long delay, the judgment was silently affirmed. But the occurrence of this case seemed to have slipped out of the memory both of the court and the attorney-general, (who was not, to be sure, in office at that time,) on the occasion of the recent argument to which we have alluded.

rate returns. To instance one obvious distinction which has not been brought out, it would be well to be informed how many trials had been had out of the sum total of convictions, so that the per centage of acquittals might justly be computed. At present, we only gather that out of 3588 prosecutions for 1852, there had been had 1443 convictions and 209 acquittals. Now of the so-called "convictions," we suppose fully one third if not one half were confessions of guilt, whereas an acquittal almost always implies a trial before the jury.

But by some strange misnomer, these summaries are year after year headed, like the one under examination, "Table showing the whole amount of the criminal business in the Commonwealth." Has the abstracting clerk forgotten that much the largest portion of the criminal business of the Commonwealth is not embraced in the returns of the district attorneys and the attorney-general? Thus, to recur to our abstract of the jails and houses of correction, Table I., how can the student of the State's criminal statistics, reconcile the statement of 9353 commitments for crime with only 3588 prosecutions? Obviously, all the doings of the Police Courts and lower criminal tribunals have been left wholly out of sight. The tables in question only contain the prosecutions before the upper courts.

And this leads us to notice how a change of laws, like a change of motive-power in a factory, seems to throw all the machinery out of gear, unless provision is made to adapt the alteration to every part affected. By the law of 1839, ch. 157, the Police Courts (we do not see why justices of the peace should not also have been embraced)[1] were required to make full returns of the cases before them to the attorney-general; and it was the practice of that officer, prior to the abolition of the office in 1843, to embody abstracts of their business, more or less succinctly condensed, into his annual report. During the interregnum, (the office, as our Massachusetts readers are well aware, being restored in 1849,) no provision was made for the return of this class of criminal cases, though the district attorneys were required to return their reports into the Secretary of State's office,

[1] This deficiency has in part been supplied by the recent act of 1852, ch. 289, requiring justices of the peace to make returns of their doings to the Secretary of State. We do not see why they should not have been made to the Attorney-General, nor why the act should not have made plain the duty of Police Courts.

where the annual abstracts of this last class of statistics were made up, which we have already noticed. On the restoration of the office of the attorney-general, his duty was renewed as to reporting upon the return of the district attorneys, but the act being silent as to Police Courts, this latter class of tribunals seemed to have thought themselves justified in declining to lend voluntary aid to the statistics of the State. So that the law, standing as it does, we would suggest for a change of title to the one now prefixed to the general summary of the attorney-general's report, the substitute, "Table showing less than half of the criminal business of the Commonwealth, but the best that can be made up."

But we are hardly ready to admit that the attorney-general's report, even in the shape in which it now stands, is as good as the law permits or even requires. If we read the law of 1844, ch. 87, aright, it is essential that the district attorneys should report the punishments awarded in each case of conviction; and the law of 1839, ch. 186, not only requires the attorney-general to report upon the same matter, but also whether the costs have been paid by the criminal or not; two important particulars, upon which we find no light in the document for the present year. But certainly we can hardly agree that, taken together, this document presents, in the language of the statute, "All such other information as may present full and complete statistics of crime, and the operation of the criminal laws in this Commonwealth, and with such observations and statements as, in his opinion, the criminal jurisprudence, and the proper and economical administration of the criminal law shall warrant and require." Doubtless if the attorney-general shall be arraigned hereafter upon this latter clause, he may well plead in justification, if legislation shall remain as it is, the maxim, "*Cessante ratione cessat et ipsa lex.*" How can he present "full and complete statistics of crime," with no better means of information before him than have been presented to the reader? — such trashy reports from jailers and keepers of houses of correction; such a want of reports from Police Courts and justices of the peace; such a faulty legislative nomenclature, that officials, however faithfully disposed, cannot understand and conform to it with any uniformity?

But we trust that legislation will not suffer the present glaring deficiencies to continue. If Massachusetts takes

any interest in the question of continuing her penal remedies against the growth of crime, whether the gallows or the penitentiary, her houses of correction or her reform schools, let her begin with establishing a statistical experience. Let her require her judicial records to be searched in the first place for the results of at least the last thirty to fifty years, now so readily accessible; at any rate, let this be done to the extent which we have suggested, in regard to capital, and what used to be capital, offences. Let her make provision that crimes against her laws shall hereafter be so named and classified, that all concerned in administering and executing them, shall understand the same thing by the same term. Let her require that all magisterial and ministerial officers shall keep and report returns of all their doings, according to a systematic classification, directed to answer all the best aims of statistical information. And withal, let her make adequate provision for remunerating the official labor required to such ends; not, as now, exacting it gratuitously from underpaid services, but if necessary, setting such a price upon it as to show that she regards the digest of her experience as hardly second in importance to that experience itself.

Having dilated thus fully upon the head of statistical returns, we find that we shall not have space enough to say what we intended upon the recent criminal legislation and jurisprudence of Massachusetts. We cannot, however, dismiss the topic of statistical exhibits fairly, without making some comments upon the judicial administration of the law which has so much to do with them.

We have felt conscious all along that it might be urged in reply to our position, that crime had increased in Massachusetts, that we had overlooked the element of the comparative severity or clemency of the courts in awarding sentences, and also their disposition to favor or disregard technical accuracy in the conduct of criminal trials. To lawyers the importance of both these considerations is at once obvious. As to the first, probably most members of the bar would suppose that the increase of convicts in the state prison, for instance, which we have pointed out, would only *primâ facie* indicate that the Massachusetts judges were more in the habit of sentencing to that institution than they had been heretofore. But why may we not urge, as we have already done in reply to a similar suggestion in another connection, that the sending more convicts to the state

prison, *primâ facie* argues that more convicts are deservedly sent there? — that it is not increased severity on the part of the courts, but a positive increase of crime on the part of the convicts?

And how as to the fact of a relative increase of state-prison commitments over those to the institutions of a milder character — the houses of correction, the jails, &c.? Our figures already given, according to Table II., show that the sentences to this latter class of prisons have increased in an equal or even greater ratio. Thus the average number of all prisoners remaining in confinement in the jails and houses of correction of the Commonwealth on a given day of the years 1843 – 5, (the best deduction as we have seen that the returns afforded) was 577; while the corresponding average for the years 1850 – 2, was 1058; an increase of 91 per cent. The increase of commitments to the state prison for the same comparative periods, rose from 99 to 189, or only 90 per cent.; while taking the average number of those remaining in confinement for the year, of the two periods in question, the state-prison convicts had only increased to 453 (for 1850 -- 2), against 975 (for 1843 -- 5); or 65 per cent. Or, separating the house-of-correction commitments from the jail, the table referred to will furnish the result, (not before stated,) of an average of 812 house-of-correction inmates on November 1, (1850 – 2,) against 459 of the same convicts in 1843 – 5; or an increase of 80 per cent. So that if the number of sentences to the state prison has largely increased of late years, the number of sentences to the jails and houses of correction, or to the jails singly, as near as we can come at it, has also increased, and in perhaps a larger ratio.

We are aware that in this comparison we do not take into account the doings of the lower criminal courts, whose jurisdiction extends to the latter class of institutions; but it is just one of the deficiencies which we complain of in these criminal statistics of the attorney-general, that the amount and kind of punishment in the instance of each sentence, has not been particularized as the law requires; and we further see the obvious use of a legislative provision which shall bring the returns of the Police Courts and justices of the peace to bear upon the general exhibit of crime.

Whether as a general thing, however, criminal justice has not been administered with more severity in Massachusetts

of late years than formerly, is a question which we should not be at once ready to answer in the negative, from the evidence afforded by the returns before us.

On the contrary, so far as they throw any light on the question, we are inclined to think that the standard of length of state-prison sentences has somewhat risen. Thus, looking at the average number of those remaining in confinement in that institution, we find that it has risen higher in proportion than the number of annual commitments. By Table III. the annual commitments have fallen off of late, from 221 in 1850, to 177 in 1852; while the average of resident convicts has risen in the same time from 411 to 483. This seems to indicate, though somewhat imperfectly we admit, that long sentences begin to demonstrate their effect, by keeping up and even increasing the average of prisoners, while the annual supply has diminished. [1]

Relying, however, upon personal observation, we should say that there had been a marked reaction in the administration of the criminal law in Massachusetts during the past ten years, towards the side of severity. We do not mean to use the phrase in any condemnatory sense, but only as expressive of strictness. Beginning with the conduct of trials, including the construction of indictments, the admission of evidence, and the ruling upon other matters of technical nicety, down to the final entry of sentence, we think there has been manifested a disposition on the part of the judiciary to reach guilt as summarily, and pronounce judg-

[1] We would barely say, in passing, that we reject the test of dividing the aggregate of years of all the sentences by the number of convicts annually committed, for the purpose of fixing an average standard of comparison. Tried by this test, we should find the average of a sentence in 1852, as two years and ninety-three hundredths (2.93), against two years and sixty-hundredths (2.60) of 1842. But we are not prepared to say that ten sentences of four years each, for instance, represent the same aggregate of punishment as four sentences of ten years each. As compared with earlier years, however, we think we can perceive a marked increase in the sentences of the last three to five years (1848 – 52) in regard to length beyond a given period, — say, two or three years. Thus, in 1841, out of 114 state-prison sentences, 52, or 44 per cent. were only for a year; while in 1852, only 18 out of 177, or about ten per cent. were for so short a period. So, comparing the sentences of three years and upwards, awarded in 1852, with those five years ago, it will be found that the relative proportion of high sentences has considerably risen. We will add, that we are able to make the above comparison from the annual state-prison reports, which, by all odds, furnish the best statistical information of any of the State penal establishments, though even these are deficient in exact nomenclature and classification of crimes.

ment upon it as rigorously, as the law and the facts would permit.

It is now upwards of twelve years since criminal sentencing underwent considerable examination and discussion in Massachusetts, in consequence of the discovery of numerous technical errors affecting the cases of large numbers of state-prison and house-of-correction convicts. We well remember that after the decision of the Supreme Court, reversing the judgment in *Shepherd's case*, (2 Met. 419,) the counsel for the prisoner informed the court that thirty cases of convicts in the house of correction for Suffolk county alone, were rendered invalid by that judgment. The attorney-general of that day, Hon. James T. Austin, signified to the court that he did not know that the matter touched his province; but ultimately, as we heard it reported, having obtained a list from the officers of the house of correction, he laid the cases before the Executive for pardon, or such other action as the Governor and Council might think best. The Executive did not deem it proper to interfere; and the convicts served their sentences out, except as their friends from time to time happened to hear of the chance of relief, and interested themselves to procure a discharge by law. In like manner, the decisions in *Hopkins's case*, (3 Met. 460,) and *Stevens's case*, (4 Met. 360,) opened the doors of the state prison to large numbers who were similarly situated. Perhaps it would be speaking within bounds to say that a quarter part of all the sentences for the higher crimes then in force throughout the State, were erroneous and subject to reversal. The discovery was first made over cases of additional punishment, or of re-committed convicts. The statement of the particulars of *Hopkins's case*, (5 Law Rep. 97,) will furnish the reader with some general idea of the nature and extent of these errors. The legislature, with an eye more especially to the relief of this class of prisoners, passed the statute of 1842, (c. 54,) giving the privilege of the *habeas corpus* and other new prerogatives to writs of error in criminal cases; even the generous — really no more than just — provision, that the Commonwealth would bear the expense of the process, wherever the judgment was reversed.

But this disturbance of the course of criminal justice was succeeded no less by an inquiry into the moral than the legal grounds of sentencing that had been in vogue. Observations were made in the legislature and elsewhere,

upon the length of some sentences that were brought into notice, particularly for petty larcenies, and we think that we are not mistaken in believing that for some time public opinion flowed strongly, and operated upon the judiciary, in the direction of mitigating criminal punishments. Judges at any rate took pains that their sentences should stand legally right upon the record, and we doubt not that the exercise of their undoubted discretion was in some degree affected by the thought of a possibility of their judgments being discussed popularly and publicly.

The effect of the movement upon jurisprudence, as might be anticipated, was just opposite from that on legislation and public opinion. If loop-holes had been discovered which threatened to let out of the net of the law a large part of the victims who had been taken in its toils, it was of course the next step of the appellate judges to make these holes as few as possible. If writs of error were a newly sharpened instrument which attacked the doings of the courts, it was proper that their edge should be dulled, except where undoubted rights demanded their helping aid. If courts had had the manliness to acknowledge some errors, (as they had fairly done,) it was not in human nature to "confess and avoid" more than was absolutely necessary.

Accordingly it seems to us that for a considerable interval following Shepherd's and Hopkins's cases, the criminal decisions of the Supreme Court of the State are to be taken with many grains of allowance for the outward pressure which attended them. Many of these, we are pretty sure, might have been decided otherwise under an altered state of facts. Thus we beg the professional reader to contrast the decision in *Tully's case*, (4 Met. 357,) — holding that it is not necessary to make an averment of *burglariter* in an indictment for burglary under the Massachusetts statutes, — with the ruling of the court in *Carey's case*, (14 Law R. 169,) — that it was only manslaughter and not murder to shoot a constable who had arrested the defendant on a charge of "breaking into" a railroad depot, because such a charge (made in undisputed seriousness) did not necessarily convey the idea of doing it with intent to steal, and so amount to a charge of felony.[1] In striking contrast also with this latter case, as also with *Wyman's case*

[1] It was this case which undoubtedly gave rise to the definition of the term of felony in the act of 1852 already noticed; a plain illustration of the old Scripture warning against putting a new patch on an old garment.

(the Phœnix-Bank President), (8 Met. 257,) to our view, is the decision of *Devoe's case*, (3 Met. 316,) decided about the time of Hopkins's case,—holding that because the legislature had enacted against burglary by a series of graduations, shop-breaking was to be taken as qualified burglary negatively described, and did not need an enumeration of statute particulars. So *Carleton's case*, (5 Met. 532.) always seemed to our thinking a strained effort to uphold an erroneous principle, in deciding that where an indictment had two counts for offences punishable with different penalties, a mixed sentence justified by neither, and exceeding either separately, was correct.

But we will not call attention to numerous criminal law decisions of this period, which we think in manifest opposition to the old rule of construing criminal law strictly; *i. e.* strictly against the State. We are pretty confident that all of our professional brethren who have ever gone so far back into the Massachusetts criminal law cases, will agree with us that the tone of the criminal jurisprudence of to-day is different from that of the time of Chief Justice Parsons.

We are not of the number of those who, as Bentham says, wish purposely to leave legal quibbles for criminals to take refuge in, "like holes for foxes to run into, for the purpose of increasing the pleasure of the chase;" but we confess to a good degree of respect for scrupulous nicety in exacting the "pound of flesh" written in the bond of the criminal law. We have always looked upon the decision of the House of Lords in *O'Connell's case*,[1] in which they held that the letter *s* made the difference of right or wrong in that great conspirator's case, as one of the noblest vindications of legal right in the annals of England.[2] And we would rather that such a point as was taken in the writ of error on *Webster's* conviction,[3] if legally valid, — that where the statute named two places of execution, the jail and house of correction, the sentence that "the prisoner should be taken to the jail from whence he came, and *thence* to the place of execution," &c., was invalid, because it excluded the prisoner from his legal right of being hung in the jail — should have excused that atrocious criminal from punish-

[1] 11 Clark & Fin. 15.

[2] The record was made up, "Wherefore the court having considered, &c. of the offences aforesaid;" whereas had it said "offence," Lord Denman would not have considered the judgment applicable to the bad as well as the good counts.

[3] Bemis's Rep., pp. 513, 521.

ment, than that any fair principle of construction should have been violated.

In this point of view, we do not think that much has been gained to the real good of the law by the recent act of legislation, (1851, c. 87,) authorizing the Supreme Judicial Court, on reversal of a criminal judgment upon writ of error, to impose a new sentence notwithstanding any portion of the old should have been served out. We know, at any rate, that at a time when defects in sentences were prevalent, the legislature year after year refused to interfere in that manner to the aid of prosecuting officers and sentencing courts. The proposal in one instance at least was known to have been openly favored by a member of one branch of the judiciary; and we well remember being informed by a senator, now himself a justice of the Supreme Court and who was then opposed to the proposition, that a brother senator declared to him that it was always his maxim, "that if a man had been hung up once on the gallows and the rope should break, he was in favor of letting him run." We are not in favor of letting him run *for that reason;* but we are in favor of letting him run and eight others with him in such case, rather than that criminal law should grow into such a mush of carelessness and confusion, that the tenth man should be convicted innocently.

Where defects in sentences are merely formal, as in the instance just taken from *Prof. Webster's case*, or that in *Reg.* v. *Hartnett*, (Jebb's Crown Cas. 301,) — where a prisoner went free of all punishment, on reversal of judgment, for the reason that the sentence to hanging omitted the order of anatomizing the body — we think the new provision of the Massachusetts law a proper one. But where there is any reason to doubt the propriety of the original conviction, or where a long endurance of confinement has altered the condition of the original commitment, we think that the law should have provided that the imposition of the new sentence should only be made upon a re-hearing of the case, or the admission of such matter in mitigation of sentence as the criminal may see fit to adduce. Simply to re-impose an old sentence in effect, upon reversing it in terms, is assuming an infallibility of judgment which we do not recognise. Thus we happen to know a case of confinement in the state prison now, where a convict, for stealing two horses worth each less than a hundred dollars, has been sentenced for six years; three years on each of two indictments. By the law of the

State, larceny of property under $100 in value, is only punishable with a maximum of one year in the state prison. If the property be worth more than the $100, then with a maximum of five years. The property in this convict's instance, was laid in each indictment as worth over the amount named, and he received the separate sentences of three years, upon pleading guilty, without any inquiry being made by the court as to its true value. His prosecutors now come forward and urge his pardon, after a confinement of upwards of four years, on the score that the property was really and *bonâ fide*, in each instance, worth less than a hundred dollars. Supposing now a writ of error upon any legal ground should procure a reversal of this sentence, (we suppose the matter of fact not a ground of error,) ought not a re-hearing to procure him his discharge? Ought not the Executive, if duly satisfied of the facts in such a case, to grant the convict his pardon? We respectfully submit that it should; and that the State has no more right to detain the prisoner beyond the statute limit of punishment, than to confine a man purely innocent.

We had desired to say something more in connection with this topic of the judicial administration of the law, upon the more important head of the just exercise of judicial discretion in apportioning sentences upon moral grounds, as also upon the propriety of restricting or even abolishing the pardoning power, which has lately been agitated. But our limits and the patience of our readers, who, we bear in mind, are only on a pleasure excursion as it were, remind us to forbear. We will only take occasion to suggest, as a summary of our convictions upon these points, that we believe that an occasional recurrence by judges to the general results of their own and their associates' criminal judgments, and a more intimate acquaintance with their practical execution as it is to be witnessed in the daily life of the convicts in the penal institutions of the State, — may we not add, a little more familiarity on their part with the newest lights of the science of prison discipline? — would do much toward remedying those inequalities of sentences which are now, we fear, too often justly complained of by the prisoners. And for the matter of abrogating the pardoning power, we would as soon be the engineer of a steam engine with the safety-valve closed, as the warden of a prison, or master of a house of correction, and no vent for the rigors and inequalities and occasional injustice of the law.

Supreme Judicial Court of Massachusetts, Middlesex, ss., Special Session, May 16 *and* 17, 1853.

Before Shaw, C. J., Metcalf and Merrick, JJ.

THE COMMONWEALTH *v.* THOMAS CASEY.

Evidence — Dying Declarations — Signs — Misnomer — Practice.

T. being at the point of death, and conscious of her condition, but in consequence of wounds inflicted upon her head, being unable to speak articulately, was asked whether it was C. who inflicted the wounds, and if so, she was requested to squeeze the hand of the person asking the question. Upon the above question being put to her with the accompanying request, she squeezed the hand of the person making the inquiry. *Held*, that under all the circumstances of the case, there was proper evidence for the consideration of the jury; they being the sole judges of its credibility and of the effect to be given to it.

THE defendant was indicted, for the murder of Angelina Taylor, at Natick, on the seventeenth of September, 1852; the indictment charging the offence to have been committed by the blow of an axe.

The defendant was an Irishman, about twenty-two years of age. He had been at work for six weeks at making shoes for Ouvra Taylor, the husband of Angelina, who himself was a shoemaker, and during that time had lived with the family, which consisted of Mr. and Mrs. Taylor, and their four children. A room in the house in which they dwelt, was used as a workshop by Taylor and Casey. He was employed under an engagement to work for six months for thirty dollars. Prior to the murder he had expressed himself as dissatisfied with Mr. Taylor, fearing he should not get his pay.

At five o'clock in the afternoon of the 17th September, Taylor and Casey were known to be at work making shoes in the shop, and Mrs. Taylor was employed in her usual household avocations. About six o'clock in the evening, a boy who lived near, in passing the house heard some loud talking, which lasted four or five minutes, in the shop, and which he thought was between Mr. Taylor and Casey, and he supposed it to be Casey, because the voice was that of an Irishman. The next morning about six o'clock, the oldest child of Mr. Taylor, a boy seven years old, came with his sister to the house of a neighbor, and said that his father and mother were killed. The neighbors immediately went to Taylor's house. They found the back door of the shop open, and Mr. Taylor on the floor dead,

with his head towards the door of the entry that led to Mrs. Taylor's chamber, and his feet within six or eight inches of his work-bench. The door of the bedroom was open, they went through it, and in the front room discovered Mrs. Taylor upon the floor in her night-clothes with her head upon a low rocking-chair. She was alive, and so continued until the twenty-first of September. A more particular account of her condition will be subsequently given. An axe, bloody and with hair upon it, was found near the entry door.

Casey was found the next morning in Framingham, four or five miles from Taylor's house. He made various statements as to where he had been during the previous night, where he was going, why he was travelling by night, &c. He said he had left Mr. Taylor's at nine o'clock the evening before, and had got lost in the woods. He was arrested and taken to Taylor's house; subsequently a complaint was made out, upon which, after a hearing, he was committed. Tracks were found in a ploughed field in the rear of the house, as of a person running. The shoes of Casey, taken from his feet after his arrest, exactly filled the tracks, and there were peculiar indentations in the earth, corresponding to the peculiar shape of the soles of the shoes. When at work, he wore an apron made of ticking, which was buttoned about his neck; upon this apron were found finger-marks of blood where it was unbuttoned. There were finger-marks of blood upon the paper of the stairway leading to his room. A shirt, supposed to be his, and which he afterwards confessed was his, was found rolled up, with stains of blood upon it, in the woods through which he passed. A voluntary confession of the crime, made by the prisoner while in jail awaiting trial, was also put into the case.

The point of chief interest in this trial, however, and the one that gives it any considerable importance, was the admission of the following species of evidence: Mrs. Taylor, as has been stated, lingered for more than two days after the fatal blow was given, although she retained her consciousness. The wound was such as to prevent her from speaking, except that in one instance she answered "yes" somewhat inarticulately. She was evidently conscious of what was passing around her, recognised her children and friends, and understood the questions that were put to her, and at the same time was aware that her chance

of recovery was hopeless, and that she was at the point of death.

The question was put to her, and the evidence was offered as her dying declarations, whether Casey was the person who injured her, and if so, she was requested to squeeze the hand of the interrogator. Upon this question being put to her, she took her hand out of the bedclothes, grasped his hand, and squeezed it for about half a minute, and then let go. The counsel for the defence objected to this evidence, but the court admitted it. The importance of the point decided by the court makes it advisable to give the evidence relating to the condition of Mrs. Taylor, and her intelligence and consciousness at the time of her answers, at considerable length.

The attending physician, Dr. Hoyt, testifies as follows:

"I went to the house of Mr. and Mrs. Taylor on the morning of the murder; found Mrs. Taylor lying on the floor in the front room on her right side; spoke to her; she put up her left hand and opened her right eye; I took her by the hand and she attempted to say something with her right eye directed to me; she held her hand out and I took hold of it; she grasped my hand; I spoke to her; she made an effort to speak, but was unable to articulate a word; she had two comforters partly over her shoulders; her lower extremities were bare; removed Mrs. Taylor to the bedroom; the bed in Mrs. Taylor's chamber had been occupied apparently by a person and child; after getting her upon the bed and in attempting to move her bloody clothes, she reached down with her left hand and pulled up the bedclothes in order to prevent exposure; examined the wound and found that it extended from the eyelid six inches across the head; there was also a wound perforating the skin on her shoulder; on her right arm were one or two bruises; the wound upon her head caused death; dressed Mrs. Taylor's wounds; while dressing them she groaned and put her hand against mine; I told her I would be as careful as I could, when she dropped her hand; I asked her if it was Mr. Casey who worked for her husband who killed her husband; she was conscious at that time in my opinion and mortally wounded; I asked her how she felt; she put her hand up to her head; some one made the remark, Doctor, can she get well? I said no, never; I think she heard the remark; she was nearer to me than was the person who asked the question. I asked her if it was Casey who injured her and killed her husband, and if it was, to squeeze my hand; she took her hand out of the bedclothes and grasped mine and squeezed it for about half a minute and then let go; at that moment I believe she was conscious, perfectly so; her eye was directed on me at the time; I thought her conscious from the expression of her eye and from her appearing to understand what was said; I asked her then if she was in pain; she turned her eye towards me and put her left hand up to her head on the left side; the next interview with Mrs. Taylor was in the presence of Dr. Allston Whitney; I spoke to her and she opened her eyes and directed them to me; I again asked her if it was Mr. Casey, the man who worked for her husband who gave her the wound; she made an effort to speak, but could not articulate so that I could understand her, and I said if it was he, to squeeze my hand; she did so again; I was satisfied that

she was conscious at that time ; I was then asked by some one if she could get well, and I answered that it was impossible ; I was then close to the bed, not two feet from her ; I then requested Dr. Whitney to take her by the hand ; a similar interrogatory was put to her again, telling her to squeeze Dr. Whitney's hand. I told her, if she knew where her children were, to squeeze my hand ; she did not squeeze it ; at that time the bandage over the wound dropped off, and she took it up herself and put it on ; her sister-in-law came in ; she put her hand out to her ; her children came in ; she put her hand out and took them by the hand ; saw her some two or three times during the day ; on Sabbath morning I saw her ; and she showed evidences of consciousness then ; in the afternoon there was less consciousness ; on Monday she seemed to be sinking away ; there was then violent inflammation ; last saw her about three o'clock on Monday afternoon.

Cross-examined. — Mrs. Taylor never articulated so that I could understand perfectly ; there was a partial paralysis ; she made a noise resembling yes, but it did not satisfy me ; her attempts were more indistinct after the first day ; the brain protruded through the wound, and in washing the wound a small portion of the brain was washed away ; in relation to injuries of the brain taking away consciousness, it would depend on the nature of the wound ; all wounds of the brain do not take away consciousness.

Dr. Simon Whitney. — Have been a physician for thirty years ; saw Mrs. Taylor on Sunday ; when I went into the room there was quite a number present, and she seemed to be asleep ; I aroused her ; examined the wound superficially, and some one asked me if she could recover; I said no ; I then took hold of her hand, and told her if it was the Irishman who worked for her husband who struck her, to press my hand ; she pressed it ; I then asked her if it was Thomas Casey, and she answered, yes ; it was heard by several others in the room, and I turned to them and said it was pretty evident who the murderer was, and soon after left.

Cross-examined. — She articulated the yes plainly ; there was a little more hesitancy than usual, but it was a plain yes ; such an injury to the brain might partially produce paralysis.

Mrs. Esther E. Jordan. — Knew Mr. and Mrs. Taylor ; lived two miles from them ; had known them six months ; had before lived close to them ; went to their house between eight or nine o'clock on the morning after the murder ; Mrs. Taylor was on the bed in the bedroom ; asked her if she knew me ; she looked up, and from the expression of her eyes thought she did ; was there when Dr. Whitney came, and heard him ask her to squeeze his hand, if the Irishman who worked for her husband was the man ; I saw her take his hand and squeeze it ; Dr. Whitney then asked her if Thomas Casey was the man who struck her, and she answered yes ; the answer was distinct enough so that any one in the room could hear it ; when the infant child was brought into the room, it pointed its finger and said 'Mama ;' Mrs. Taylor groaned, and as she seemed affected by the presence of the child, it was carried out.

Dr. Allston Whitney. — Visited Mrs. Taylor on Saturday in company with Dr. Hoyt ; when by the bedside was asked whether she could live, and I answered that she could not ; I took hold of her hand ; Dr. Hoyt said, Mrs. Taylor, if it was the Irishman Casey who killed your husband and struck you, squeeze his hand ; she squeezed my hand perceptibly ; Mrs. Taylor was then asked to squeeze my hand if she knew where her children were ; her hand did not squeeze at all ; the children were not in the room at the time ; indications of consciousness were apparent, such

as replacing the bedclothes where they were displaced from her person, and putting her hand to her head when asked if she was in pain.

Mrs. Louisa M. Titus, sworn. — Went of my own accord at 5½ o'clock on Saturday afternoon, to take care of Mrs. Taylor; she showed signs of consciousness when the children were brought to see her; she stretched out her hand as if she wanted to shake hands with them; Ouvra, the eldest, drew back, and said he was afraid of his mother; but little Agnes, the next, shook hands with her; when asked if Casey struck her, she made a noise, as if she was trying to say yes.

Miss Ellen A. Harris. — Knew Mrs. Taylor; lived on the other side of the street; saw her at 10 o'clock Saturday morning; was there when the elder Dr. Whitney asked her if the Irishman killed Ouvra and struck her, and if so to squeeze his hand, and she distinctly answered yes."

Another witness testified that he saw Mrs. Taylor the morning after the wounds were given; that she was asked whether she was cold; and that when thus asked, she opened her left eye, and attempted to draw the corner of her clothing over her shoulders.

The decision of the court in regard to the admissibility of this kind of evidence was briefly delivered by the Chief Justice, substantially as follows: — We appreciate the importance of the question offered for our decision. Where a person has been injured in such a way that his testimony cannot be had in the customary way, the usual and ordinary rules of evidence must from the necessity of the case be departed from. The point first to be established, is, that the person whose dying declarations are sought to be admitted, was conscious that he was near his end at the time of making them; for this is supposed to create a solemnity equivalent to an oath. If this fact be satisfactorily established, and if the declarations are made freely and voluntarily, and without coercion, they may be admitted as competent evidence to go to the jury. But, after they are admitted, the facts of the declarations and their credibility are still for the judgment of the jury.

In regard to the matter then before the court, and the admissibility of the signs by Mrs. Taylor, in reply to the questions put to her, it is to be observed that all words are signs; some are made by the mouth and others by the hands. There was a civil case tried in Berkshire county, where a suit was brought against a railroad company, and the question was, whether a female who was run over survived the accident for any length of time. She was unable to speak, but was asked if she had consciousness to press their hands, and the testimony was admitted. If the injured party had but the action of a single finger, and

with that finger pointed to the words yes and no, in answer to questions, in such a manner as to render it probable that she understood, and was at the same time conscious that she could not recover, then it was admissible evidence. It is, therefore, the opinion of the court, that the circumstances under which the responses were given by Mrs. Taylor to the questions which were put her, warrant that the evidence shall be admitted, but it is for the jury to judge of its credibility and of the effect which shall be given to it.

Another incident of some interest occurred at the close of the trial. We copy the account of it from the newspaper report of the trial.

"The Government here rested its case.

Mr. Butler, counsel for the prisoner, here said he would waive his right to make an argument. To this the counsel for the Government agreed.

Mr. Butler called the attention of the court to the fact that the indictment charged the prisoner with the murder of 'Mrs. *Angelina* Taylor.' No evidence had been produced to show that a person of that name had been murdered; but it was a person whom the witnesses have called at times *Angeline*, and at others Mrs. Taylor.

Mr. Choate thought the question raised by the counsel for the defence carried no weight with it, and appealed to the law authorities in support of his argument. The grand jury, after a very laborious session, had found a bill against the prisoner for the murder of Mrs. Taylor, which was a true bill, and the counsel for the defence was mistaken on a point of law.

Mr. Butler cited various authorities to maintain his point. There was a manifest difference between the names of *Angelina* and *Angeline*, and as we have no evidence concerning a person of the name of *Angeline*, the informality should be in favor of the prisoner.

Mr. Choate argued that undoubtedly the name of the deceased was by baptism *Angelina*, and that she was called for familiarity by her friends *Angeline*. The objection of the counsel for the defence was a mere quibble, a technicality. To set this beyond a doubt, he asked permission of the court to introduce evidence that the deceased was christened *Angelina*.

Mr. Butler opposed the motion of the Attorney-General. The case had been closed on both sides, and previous to the charge being given to the jury, we raise a point of law

in behalf of our client, and to set that point at rest, the Attorney-General wishes to introduce more evidence, to open the case again. The case could not be opened again; and he cited the celebrated Earl of Cardigan case, to sustain his position. He assumed his point was a good one, and the prisoner at the bar, who is in jeopardy of life, was entitled to the benefit of it. He would enter his protest against the motion of the Attorney-General.

Mr. Choate thought the case had not proceeded too far to allow testimony to be introduced; and if it were introduced it would not impair the rights of the prisoner. He craved the judgment of the court in the premises.

After a consultation the court decided that the whole system of Massachusetts was to get rid of the old forms of technicalities, and to try cases on their naked merits. In the present case the court sees no objection to the supplying of evidence to settle a technicality. The technical point, in the opinion of the Chief Justice, was not a good one in law. There had been no evidence to show that the name of the deceased was not *Angelina*, and the point of law was merely an allegation of the counsel for the defence. It was not too late to introduce evidence on the point, and he ruled that it should be admitted.

Mr. Titus recalled. — On the day of the murder, Mrs. Taylor's mother called her *Angelina;* and I believe it is so called in the Bible; could not say that in her lifetime I ever heard her mother call her by any other name than *Angeline*; Mrs. Taylor was always called by, and answered to the name of *Angeline.*

Mr. George W. Davis recalled. — Had heard his sister called *Angelina* and *Angeline*, and heard her answer to both; am younger than my sister, and do not know whether she was baptized or not; can't say that she had a middle name; have never seen her name as she wrote it herself.

Mrs. Paul recalled. — Have heard the deceased called by and answer to both names.

Cross-examined. — Saw her name registered in the family Bible as Angelina E. Taylor.

Mrs. Jordan recalled. — Had heard the deceased called by and answer to both names.

[While the court was deliberating on this new testimony, a deed was found by Mr. Butler, in the Register's office, below, with Mrs. Taylor's signature written "*Angelina* Taylor," though in the commencement of the deed

the scrivener wrote it *Angeline.* Mr. Butler then withdrew his objection to the indictment.]"

The prosecution was conducted by Hon. *Rufus Choate*, Attorney-General, and *Charles R. Train*, the District Attorney; Messrs. *B. F. Butler* of Lowell, and *G. A. Somerby* of Waltham, appeared for the defence.

Municipal Court, City of Boston, June Term, 1853.

Before PERKINS, J.

COMMONWEALTH *v.* ALBERT W. QUIMBY.

Indictment — Subornation of Perjury — Deposition — Extra-Judicial Oath.

A commissioner, to whom a commission is directed, authorizing and empowering him to take the testimony of a particular witness, is not thereby authorized to administer the oath to, and take the testimony of, a different person, although such person represents himself to be the witness named in the commission.

A commission issued from the Supreme Court of Massachusetts to O'Donnell, a commissioner for Massachusetts residing in Portland, Maine, duly appointed and qualified, empowering him to take the deposition of James Dixon. One William Grose, at the procurement of Quimby, presented himself before O'Donnell as James Dixon, gave his testimony, and subscribed the deposition as James Dixon. Upon an indictment against Quimby for suborning Grose to commit perjury in his testimony before O'Donnell, it was *held*, that O'Donnell had no power to administer the oath to Grose; that no perjury was therefore committed; and that the indictment for subornation of perjury could not be sustained.

THIS was an indictment against the defendant, found at the June term of the Municipal Court for the City of Boston, A. D. 1853, charging him with the crime of subornation of perjury. The indictment alleged substantially, that, at the Supreme Judicial Court begun and holden at Boston, within and for the County of Suffolk, on the first Monday of November, A. D. 1851, a writ and suit were entered at the clerks' office of said court, in which one Calvin P. Soule, of said Boston, master mariner, was plaintiff, and Albert W. Quimby of said Boston was defendant, said writ bearing date October 4, 1851; that on the 1st December, 1851, the said defendant Quimby filed in said court in said action a declaration in set-off, setting forth a promissory note in substance as follows — "Londonderry, Nova Scotia, Nov. 28, 1849. On demand, I promise to pay to the order of A. W. Quimby thirty-six hundred dollars, value received. Calvin P. Soule. Acknowledged, William Grose;" — and setting forth certain indorsements thereon; that the said suit was then pending in said court; that before the trial and during the

pendency of the said action in said court, to wit, on the 4th September, 1852, the said Quimby, in due course of law, took out of the clerk's office of said court a commission under the seal of said court, directed to any commissioner appointed by the Governor of Massachusetts, or to any justice of the peace, notary public, or other officer legally empowered to take depositions or affidavits in Portland, in the State of Maine, and empowering such person to take the deposition of James Dixon, of Pugwash, Nova Scotia, now of St. Johns in the province of New Brunswick, or Portland in the State of Maine, said deposition to be used in all actions of contract pending in said court between the said Soule and Quimby; that this commission, thus issued, passed on the 5th October, 1852, into the hands and possession of James O'Donnell, Esq. at said Portland; he then and there being a commissioner duly authorized and empowered to take testimony to be used in the courts of Massachusetts, and then and there duly empowered and qualified to administer an oath to the person presenting himself as the person affiant, deponent and witness named as James Dixon in said commission; that it was material to the issue raised in the said suit, that the person appearing before said commissioner and then and there answering said interrogatories, &c. should be James Dixon and no other, and that his answers therein signed by him and sworn to, should be true; that the said Albert W. Quimby, the said defendant, at Boston, before said commission was executed, wickedly contriving, &c. did then and there unlawfully, &c. suborn and procure one William Grose to be and appear as a witness before said commissioner, to wit, the said James O'Donnell, at Portland, and then and there wickedly, &c. to personate and assume to be said James Dixon, and to commit then and there wilful and corrupt perjury, by falsely deposing, swearing, and answering in evidence before the said commissioner to the several interrogatories, &c.

The indictment then set out the assignment of perjury, in answering falsely, upon oath, certain of 'the interrogatories ,and cross-interrogatories, and then alleged that the said deponent himself was not James Dixon, and that all his statements, answers and oaths were wilfully, knowingly, and corruptly false, that they were material to the issue and made in pursuance of said solicitation, subornation and procurement.

After the jury had been impannelled and the indictment been read, Farley of counsel for the defendant took several objections to the indictment. The one principally relied upon, was, that it did not set forth the offence intended to be charged; but on the contrary showed that no such offence had been committed. It was contended that in order to sustain an indictment for subornation of perjury, it must appear that the crime of perjury had been committed; that it did not appear that the crime of perjury had been committed, inasmuch as the oath administered by the commissioner was wholly unauthorized and extra-judicial; that the power of the commissioner to administer the oath in that case was derived wholly from the Supreme Court of Massachusetts from which the commission issued, and his authority was prescribed and limited by the instrument under which he acted. By this he was empowered to take the deposition of James Dixon, but of no other person; and that it appeared by the indictment, not that the oath was administered to James Dixon, but to William Grose, another and different person.

Upon this ground he moved the court that the indictment be quashed, and the court sustained the objection, and ordered the indictment quashed.

Geo. F. Farley and *Benj. Butler*, for the defendant.

Hon. John C. Park, District Attorney, for the Commonwealth.

COMMONWEALTH *v.* HIRAM SHEPARDSON.

Indictment—Alibi—Mistake of Witnesses as to the Identity of Defendant.

IN the month of February, 1852, a person by the name of Hiram Shepardson, the keeper of a hotel in Roxbury called the Warren House, was arrested at his house by authority of a warrant issued from the Police Court of Boston, and was examined before said court upon three complaints for obtaining butter under false pretences. He asserted constantly that he had never seen either of the complainants, and offered to prove an *alibi* in defence to each of the charges, but the court informed him that it was merely a preliminary examination, and that it would do no good to prove one, because they could not pass upon contradictory testimony in such a case. The judge there-

upon ordered him to find sureties for his appearance before the Municipal Court at the March term, 1852, in the sum of six hundred dollars, which was immediately done. The grand jury presented three bills of indictment at the March term, and preparations were made on both sides for a sharp trial, which was had the same term; *J. C. Park*, District-Attorney, conducting the case in behalf of the Commonwealth, and *E. N. Moore* and *J. H. Bradley* appearing for the defendant.

In the indictment first tried, the goods of one Paschal H. Hall were alleged to have been obtained under false pretences. Hall swore positively that Shepardson came to his store in Boston, in January, 1852; looked at a tub of butter, agreed to buy it, and said he would call in an hour or two and take it; that about noon he called, drew out his purse, looked over his money, hesitated, then said he had not quite money enough; that he had a note to pay; that he could not pay then, but would call in to-morrow or send his clerk up and pay for it; that he had traded there before with Hall's clerk (Mr. Ford); that his name was William Cushing, and that he did business at No. 62 Long Wharf; that he carried away the butter, but had not since been to pay for it. Mr. Hall also testified that he had been to No. 62 Long Wharf, but could find no such person or hear of him. He also swore that at the time of obtaining the butter Shepardson had a Brattleborough sleigh, with a gray robe on the back part of the sleigh, and a buffalo robe in front, with a dark bay horse; and that Shepardson wore a black hat and dark-colored outside coat.

The clerk of Mr. Hall was then called, who swore that he was present; saw the defendant at the time he got the butter, and delivered the same butter to him. He also gave the same description of the person who got the butter, and was positive that the defendant was the man.

The government then offered to prove, as evidence to show the fraudulent intent, and to establish the identity of the defendant, that on January 10, and February 3,—these being the complaints upon which the two other indictments already spoken of were found,—that by precisely similar representations, and under similar circumstances, the defendant obtained butter of Fay & Brother, and Doe & Farlow, Boston merchants. This was objected to by defendant's counsel, on the ground that it introduced three

issues, entirely independent of each other, tending to prejudice the defendant before the jury, and putting upon him issues which he could not be expected to meet on that trial; and further, as an attempt to prove one crime by showing another that had no connection with it. After a long argument on both sides, the presiding Judge (Mellen) admitted the evidence.

Mr. Fay then swore that the defendant, under similar pretences and circumstances, obtained butter of him on the tenth of January, 1852. He gave the same description of the appearance and dress of Shepardson on that day, and of the horse and sleigh, as Mr. Hall and his clerk had done; and he was positive as to the identity.

Doe & Farlow being called next, gave the same description and circumstances, and swore as positively to the identity of the defendant. The next witness was officer Silas Warren.—He swore that he arrested the defendant and searched his house, but found nothing there belonging to either of the complainants.

The government here rested the case. Mr. Moore, in opening for the defence, stated that the defence relied upon would be an *alibi;* and then put in evidence showing that on the ninth and tenth of January and third of February, the defendant was not where the government alleged that he was. Evidence was also introduced to show that Shepardson always wore a light drab outside coat; and it was proved that he always had sustained a good character for honesty, which was not denied by the government. Here the testimony closed, and the case was argued by Mr. Bradley for defendant, and Mr. Park for the Commonwealth. The court, in giving the case to the jury, told them that they must not consider the testimony which had been objected and excepted to by the defendant's counsel as evidence, except so far as it tended to prove the identity of the defendant; that it was not competent testimony to show the intent of the defendant. The jury then retired, and at the expiration of several hours came in and said they could not agree, and the court discharged them. The jury stood seven for acquittal.

The attorney for the government then called up the indictment, in which Fay & Brother were alleged to have been defrauded by the defendant. Mr. Fay testified as before. Mr. Hall and his clerk, Doe & Farlow, a Mr.

Nightingale and Mr. Clark, were then offered to prove that the defendant had obtained butter of them under similar representations at different times, as tending to prove the identity and fraudulent intent. This was strenuously objected to by defendant's counsel, but the court admitted the testimony, so far as it tended to prove identity. Doe & Farlow testified as before. Hall and his clerk began to doubt, and testified with less confidence. Nightingale testified that Shepardson came to his store on the 20th December, 1851, and obtained butter under similar circumstances. Clark, his clerk, testified to the same, with the addition, that he saw the defendant on 10th of January, followed him in his sleigh as above testified to, and in the same dress as above described, to Mr. Fay's store, thence to Roxbury to a public house, which was not the Warren House kept by the defendant, and then back again into Boston, where he left him. On the cross-examination, Clark admitted that he had been out to Shepardson's house and seen him, and that on his return he stated to Nightingale and others that he could not identify him; but he also swore that since then he had altered his mind, and was now positive that Shepardson was the person who obtained Nightingale's butter, and the person whom he saw go into Fay's. Nightingale also swore that the person who got the butter from him was met by him in State street, and a conversation about the butter followed, in which he admitted the deceit, promised to pay for the butter, and that he saw the same person at several times, and that Shepardson was the man. On the cross-examination he admitted that he had been out to the Warren House in Roxbury and seen the defendant, and had said that he could not swear to his identity; notwithstanding it was after he had seen him twice as he thought since he lost his butter. Three officers were then introduced, who testified that once or twice they had seen the defendant with a dark outside coat, but generally with a light coat. On the cross-examination they could not swear positively that it was not a dark frock coat. The government had made every effort to strengthen their case and obtain a verdict by introducing another complaint, and thereby burthening the defence with four distinct issues.

The government again rested their case, and again an *alibi* was made the substantial ground of defence. Nearly the same witnesses were introduced to establish the *alibi*

and good character as before, with the addition of all the livery stable-keepers in Roxbury, to show that Shepardson had never hired such a sleigh and horse as described by the government witnesses; it being admitted that Shepardson had never kept a horse or sleigh.

While these cases were being tried, the grand jury found two new indictments against Shepardson for the same kind of offence, viz., obtaining one tub of butter by false pretences and by precisely similar means from said Nightingale and another from a Mr. Hobbs. After earnest and able arguments both for the defence and for the prosecution, the cou summed up to the jury as in the previous case.

The jury after being out all day, came in and announced that they could not agree upon a verdict, and the papers were taken from them. The counsel for defendant then began to make inquiry for the purpose of detecting the real offender; and ascertained that a person in Chamber Street had lost butter in the same way, but had found the offender. The discovery was made as follows. He noticed that the whip in the sleigh, which was precisely like that described by the government witnesses, had the name of Pratt upon its handle. He went to the stable in Sudbury Street kept by a Mr. Pratt, and there ascertained that the sleigh in question was procured from that stable, and who the person was that hired it. When this fact was ascertained, Mr. Pratt and the person above named were shown Mr. Shepardson, and were respectively positive that he was not the person who hired said horse and sleigh, or who had procured the butter in Chamber Street. A warrant was then obtained against a person who gave his name as Holbrook, for the last-mentioned offence, and he was brought before the court, where he waived an examination and gave bail in two hundred dollars to appear at the Municipal Court. In the mean time another warrant against the same person, for a similar offence in Roxbury, was procured, and upon this also he waived an examination, and gave the bail as before. Afterwards, and before the next court, all of the butter similarly obtained in Boston and elsewhere was paid for, and the above-named amount of bail forfeited at next term of the court in Suffolk and Norfolk respectively, and paid. The witnesses who had sworn against Shepardson were brought to see said Holbrook, and admitted that they were mistaken, and that Holbrook was the guilty party. It also appeared from Mr. Pratt's books that Hol-

brook had the horse and sleigh of him on the several days in December, January and February, before described.

The grand jury having been informed by the district-attorney of the above facts, called the same witnesses before them, and then advised the county attorney to enter a *nol. pros.* upon all of the indictments against Shepardson, and to have Shepardson honorably discharged in open court.

Supreme Judicial Court, Suffolk, March Term, 1853.

MARY BROWN *vs.* EASTERN R. R. Co.

Common Carriers of Passengers — Restriction of Liability by Notice.

A notice that a railroad corporation would not be liable for the baggage of passengers beyond a certain amount, unless, &c., printed on the back of the passage ticket, and detached from what ordinarily contains all that is material to the passenger to know, does not raise a legal presumption that the party at the time of receiving the ticket and before the train leaves the station, had knowledge of the limitations or conditions which the carrier had attached to the transportation of the baggage of passengers.

How it would have been, had the notice been on the face of the passage ticket, *quære.*

THIS was an action of assumpsit against the defendants, as common carriers of passengers, for loss of baggage. The delivery of two trunks containing baggage, and the non-delivery of one of them at the place of destination, and a demand therefor and its value, were fully proved. The contents of the lost trunk consisted of the wearing apparel of the plaintiff.

There was also evidence introduced, tending to show the following facts, to wit: That at the time of the arrival of the plaintiff at the depot in Boston, she delivered the two trunks to the baggage-master of the defendants, and asked for checks. He said he was out of checks, and he marked the trunks "Freeport." When so delivered, the trunks were marked "Mary Brown, Freeport, Maine." The plaintiff inquired at the ticket-office of the defendants in Boston for a ticket to Freeport, Maine, and was told that no tickets were sold to Freeport, but that she could buy a ticket for Brunswick, (a place beyond Freeport,) and get out at Freeport, and that one dollar would be refunded to her; that on being answered as above, she paid three dollars, and received a ticket which had printed on its face the following words: "Not transferable. This ticket entitles to a passage in the first

morning train of this day only, via the Eastern, the Portland, Saco and Portsmouth, the Atlantic and St. Lawrence, the Kennebec and Portland Railroads to Brunswick or Bath. At Bath, steamboats connect with Richmond, Gardiner, Hallowell and Augusta. Fare paid to Bath. One dollar will be refunded to the holder of this ticket, by the conductor on the Kennebec and Portland Railroad." And on its back the following words: "Notice — Passengers are not allowed to take, nor will these companies be responsible for baggage, if it exceed fifty dollars in value, unless freight on any addition thereto be paid in advance; and this notice forms part of all contracts for transportation of passengers and their effects."

On the Portland and Kennebec railroad, plaintiff asked the conductor for the one dollar, who answered that the ticket-master would refund it to her, which he did. At that time there was a break in the line of railroads of about one mile in Portland, and it was the practice of the defendants to transport over that break the baggage of passengers for Brunswick, but not those for Freeport, and that at this break the plaintiff did not look after her baggage, and there was no evidence that it was conveyed across the break at all. There was no evidence that the plaintiff had any notice or knowledge of this practice.

There was also evidence, that in the cars between Boston and Portland, the plaintiff called the attention of a companion to the words on the back of the ticket. When the plaintiff got out at Freeport, the baggage-master put out her other trunk, and the depot-master told him there was another; and the baggage-master (the cars being then in motion) said he would bring it back on his return. It was admitted that there was no actual or constructive notice to the plaintiff of the limitation of the liability of the defendants, except the said printed notice on the ticket.

On inquiry from the court, the counsel for the railroad said he should contend that the words on the face and back of the ticket formed or were part of the contract between the parties, and that by that contract the defendants were not bound to transport the trunks over said break in Portland, and that the loss happened there, and that they were not responsible for the baggage, it being worth more than fifty dollars; or at any rate for not more than fifty dollars.

After some discussion, the court said it should rule that the taking the ticket raised no legal presumption that the

plaintiff read the printed matter; that it was a question of fact whether she knew the contents before she started on her journey; and that if she did not read it until she was on her way, her rights were not affected by it; and that if the contract was for a passage to Freeport or to Brunswick, with permission to get out at Freeport, the railroad was bound to transport the baggage across said break, unless notice was given that they should not do so.

On the above rulings, the case was submitted to the jury without argument from either side, and the defendants excepted. A verdict was returned for the plaintiff, and damages assessed at $141.78.

The opinion of the court was delivered by

Dewey, J. — We have not found it necessary in the decision of this case, to enter upon the consideration of the vexed question of the right of common carriers to limit their common law liabilities, by notices to the public to the effect that they will not be responsible for the baggage of passengers, or for merchandise transported by them as public carriers. It has been seriously questioned by some judicial tribunals, whether such notices could be made available at all, inasmuch as they were supposed to be in contravention of public policy, having a tendency indirectly to encourage negligence, if not actually to favor frauds and embezzlement by the servants of the carrier. *Hollister* v. *Nowlen*, (19 Wendell, 234); *Cole* v. *Goodwin*, (Ib. 251); 2 Greenl. Ev. § 215.

The doctrine is nevertheless gradually being incorporated into the jurisprudence of the times, that such limitations may under proper qualifications and safeguards, for securing due notice to the traveller, or the party for whom goods are to be transported, be held operative and binding upon the parties. It is so in England; also in some of the States of this Union by direct adjudications. *Bingham* v. *Rogers*, (6 Watts and Serg. 495); *Laing* v. *Colder*, (8 Barr, 484); *Swindler* v. *Hilliard*, (2 Richardson, S. C. 286.)

Without questioning the right of common carriers to make reasonable limitations as to the extent of their liabilities for baggage or merchandise to be transported by them, and conceding the decisions to that effect to be sound, we are of opinion, nevertheless, that they furnish no ground for denying the plaintiff's right to maintain this action. The cases that yield this point of the right of the carrier to limit his responsibilities, yet hold that it is necessary for him to

show clearly that the person with whom he deals is fully informed of the terms of such limitations, and the conditions upon which he receives baggage and merchandise for transportation. Such notice is to be specific and certain. This rule was applied in the case of *Camden and Amboy Railroad* v. *Baldauf*, (4 Harris, 67,) where a notice in the English language to a German ignorant of the English language, was held of no effect as a notice of a limitation of the common law liability, the court saying that it was incumbent on the carrier in such case to prove the knowledge by the passenger of the limitation imposed. In *Butler* v. *Heane*, (2 Camp. 415,) where the limitation was printed in small type, the bill generally being in large type, the notice was held not to be valid. It was also applied in *Davis* v. *Willan et al.* (2 Stark, Rep. 274); in *Kerr* v. *same*, (Ib. 53); and in *Macklin* v. *Waterhouse*, (5 Bing. 212.)

Confining the decision to the precise case, we are of opinion that the instruction to the jury was correct, and that receiving this ticket in the manner stated, raised no legal presumption that the plaintiff had the requisite notice, and that it was a question of fact whether she knew the limitation before she started on her journey.

The limitation and notice thereof were, in the present instance, attempted to be established under these circumstances. The traveller, a female, had delivered her trunks to the baggage-master of the defendants, to be carried to Freeport. They were received by him, without any notice of any limitation of liabilities for safe transportation, and marked for their proper destination. Subsequently the owner applied for her passage-ticket to Freeport, and was informed that they did not sell tickets to Freeport, but that she could buy one for Brunswick, a place more remote, with the privilege of stopping at Freeport, and having one dollar refunded; and that thereupon she paid three dollars, and received a ticket to Brunswick. This ticket had on its face the route, and various railroads to be passed over, and the notice that one dollar would be refunded to those stopping at Freeport. There was no notice on the face of the ticket of any conditions or limitations as to transporting the baggage of passengers. The only notice as to that, was on the back side of the ticket. No direct notice was given by the ticket-vendor, nor was any request made to her to read the limitations and conditions stated on the back of the ticket.

It was admitted that there was no actual or constructive

notice of the limitation of the carrier's liability, unless the same was derived from the ticket received by the plaintiff. This being so, the case was in our opinion properly put to the jury, and their verdict for the plaintiff may well be sustained. A mere passenger ticket in the form in general use, would not naturally induce to the minute reading of its contents. The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on his ticket. But if it be correct to hold that if this limitation had been stated on the face of the ticket, and in connection with the name of the place to which the party was to be carried, and so might be presumed to have been read, and therefore binding upon the person receiving the ticket; yet nevertheless a statement or notice to this effect, placed on the back of the ticket and detached from what ordinarily contains all that is material to the passenger, would not raise a legal presumption that the party at the time of receiving the ticket, and before the train had left the station, had knowledge of the limitation or conditions which the carrier had attached to the transportation of the baggage of the passengers.

The manner adopted by the defendants to give notice of such limitation and conditions, fails to furnish that certain information or knowledge which must be brought home to the passenger to exonerate the carrier from the full common law liability as to such baggage, and therefore leaves the passenger the right to recur to the carrier for the damages he may sustain in the loss of his baggage, irrespective of the limitation.

I am aware that in reference to ordinary merchandise transported by common carriers, it has been held in some cases in the English courts, that a ticket given to the owner of merchandise, containing on the face of it a condition or limitation of the liability of the carrier, was held to furnish evidence of the special contract of transportation, sufficient to affect the owner of the merchandise, and to limit the liability of the carrier. *Austin* v. *Manchester, Sheffield, &c. Railway Co.* (11 English Law & Equity Rep. 506); *Shaw* v. *York and North Midland Railway Co.* (6 Railway Cases, 87; S. C. 13 Q. B. 347.

These cases obviously differ from the present, and fail to satisfy us of the sufficiency of the notice in the case before us.

Exceptions overruled, and judgment for the plaintiff.

Recent English Decision.

Court of Exchequer, Easter Term, May 8, 1852.

CARR *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway Company — Carriers — Limiting Responsibility.

A party delivered to a railway company, (who were common carriers of passengers, horses, goods and chattels,) a horse, to be carried from A. to B., the ticket or way-bill containing the following notice: — "N. B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the railway, or in their vehicles." In consequence of gross negligence on the part of the defendants, the horse-box containing the horse was struck by an engine on the line and the horse killed: — *Held*, that the company were not liable to the owner of the horse in an action on the contract to carry. (Per Parke, Alderson, and Martin, BB.; dubitante Platt, B.)

THE declaration alleged that the defendants were the owners and proprietors of a certain railway, to wit, the Lancashire and Yorkshire Railway, and were also possessed of certain engines, carriages, and horse-boxes used by them for the carriage and conveyance therein and thereon of passengers, horses, cattle, goods and chattels, in, upon and along the said railway, as common carriers for hire and reward; that the plaintiff, to wit, at Wakefield, in the county of York, at the request of the defendants, caused to be delivered to the defendants a certain horse of the plaintiff of great value, &c., to be, for certain hire and reward to be therefore paid to them the defendants, carried and conveyed by them the defendants in a certain carriage of the defendants, to wit, a horse-box, on and along the said railway, to wit, from Wakefield aforesaid to a certain place, to wit, Knottingly, &c.; and the defendants then accepted the said horse to be so carried and conveyed by them, upon and subject to certain conditions then assented to by the plaintiff, to wit, upon the conditions expressed and contained in a certain notice printed at the foot of the ticket or way-bill of the company, for the carriage and conveyance of the said horse, &c., and which notice was in the words and figures following, that is to say — "N. B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehi-

cles." It then averred that the defendants having received the horse to be so carried and conveyed by them, it thereupon became their duty to take due and proper care of the horse while on their railway and in their custody, and to use proper and ordinary care, skill and diligence for the safely and securely carrying and conveying the horse, &c., and while the horse should be on the railway to use ordinary care, skill, and diligence in conducting, managing, and directing the engines and carriages in and upon the said railway, alleging as a breach, that the defendants, not regarding their duty in that behalf, took so little and such bad care, and used so little skill and diligence in the premises, that while the said horse was in their custody, by and through the improper conduct and gross negligence of the defendants, and from the want of such proper care, skill, and diligence on their part, and without any default or neglect on the part of the plaintiff, the horse-box in which was contained the said horse, then being on the railway of the defendants, was struck by a certain engine, then also being on the said railway, and the horse-box was then propelled along the railway, to wit, down a siding of the railway, against certain other trucks and carriages, and was then forced and made to strike against the said trucks and carriages, with so great and unnecessary violence that the horse of the plaintiff, by reason of the concussion so occasioned, sustained serious damage and injury, and shortly afterwards died from and in consequence of such damage and injury, and the said horse became thereby, &c. wholly lost to the plaintiff; and the plaintiff was also by reason of the premises subjected to and incurred divers expenses, to wit, &c., in the removal of the horse out of the horse-box, and for the keep, medicine and attendance provided for the horse, and for surgical and medical advice in attempting to cure the horse of the said injuries, &c. To this declaration the defendants pleaded not guilty. The cause having been tried before Alderson, B., and a verdict returned for the plaintiff,

Tomlinson obtained a rule to arrest the judgment, which was argued on the 7th and 8th May, 1852, when

Atherton and *Cowling* showed cause, who referred to the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68, ss. 4 and 6; and cited *Wyld* v. *Pickford*, (8 M. & W. 443); *Stuart* v. *Crawley*, (2 Stark. 323); *Furnivall* v. *Coombes*, (5 Man. & G. 736); *Shaw* v. *The York and North Midland Rail-*

way Company, (13 Q. B. 347); *Chippendale* v. *The Lancashire Railway Company*, (15 Jur. 1106); *Austin* v. *The Manchester Railway Company*, (Ib. 670; and S. C., not then but since reported, 16 Jur. 763).

Wilkins, Serj., and *Tomlinson*, who appeared to support the rule, were stopped by the Court.

Parke, B. — This rule must be made absolute. The question turns entirely on the construction of the notice in the ticket or way-bill, which is the foundation of the contract between the parties. First, it is clear that since the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68, it is competent for a carrier to enter into a special agreement with the person who sends goods to be carried. It is clear also that the conveyance in the present case was under such a special contract between the plaintiff and the defendants; and the only question is as to their meaning. Certainly, in many old cases, for reasons more or less good, the construction of notices by carriers has gone to this, that under the most extensive terms of exoneration from liability, a carrier is responsible for gross negligence. He is treated as an insurer, and in order to render him liable it is not necessary to prove that he has done an act throwing off the character of carrier; and the system of protecting themselves by notice in the manner pointed out by the Carriers' Act has not altered their condition in this respect. Whether or no these defendants are liable as common carriers with all the responsibilities of such, *i. e.* bound to carry with safety, and protected only from loss occasioned by the act of God or the Queen's enemies, is a question which we cannot discuss on this record. If the intention of the plaintiff were to make them liable as common carriers, he should have tendered a reasonable sum for carriage, and then brought his action for refusing to carry pursuant to their usual course as carriers. Whether he could have succeeded in such an action we need not decide — certainly every common carrier of goods for hire is only bound to carry such goods as he has made public profession to carry: as was decided by this court in *Johnson* v. *The Midland Railway Company*, (4 Exch. 367.) We have however, as I have said, nothing to do with that question on this record: for here is a special contract for the carrying of this horse. Such contracts were construed rather strongly against carriers with respect to goods which formed the ordinary subject of carriage before railways were established.

Formerly carriers carried live cattle very seldom, sheep seldom, horses never. Since the introduction of railways it is different, and amongst other things *animals* are delivered to be carried. Now it is perfectly reasonable for a carrier to protect himself from all consequences whatsoever that may arise on the carriage of horses. The carrying them is a very dangerous thing, not merely from the ordinary accidents of railway conveyance, but also from this, that they are conveyed in a carriage which is itself a source of much danger. The animal may be alarmed by the noise of the travelling, and be the cause of its own loss by destroying its life. It is therefore reasonable that carriers should protect themselves by special contract against all liabilities in such cases: and the only question is, Have the defendants in the present case so protected themselves by their notice as to excuse them from the consequences of gross negligence in carrying this horse, which the jury have found against them? I think, construing this contract with reference to the subject-matter, the owner takes on himself all the risk of the transit, the company engaging to furnish carriages for the purpose, and to cause them to be impelled along the line, but that every risk is on the owner himself. The words are, "This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever;" consequently not at the risk of the carriers, but of the owner, subject to the condition that they will lend the engines and steam power. It then goes on, "as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." This is therefore a contract by the company with the plaintiff that he is to stand to all risks: and that is not an unreasonable contract, considering the many risks which may arise from the temper of the horse and other causes unknown to the company. It is satisfactory to us to know that a similar opinion has been pronounced by the Court of Common Pleas in the case of *Austin* v. *The Manchester Railway Company*, disposed of this very day, in which the words of the contract are indeed different from those of the present, but when looked to for this purpose do not appear to be different in effect. That was an action for negligence in not taking due care against fire, the declaration charging that in consequence of the gross neglect of the defendants the carriage in which

the plaintiff's horse was placed was destroyed by fire. In that case the contract was made "subject to the plaintiff's undertaking to bear all the risks of injury by conveyance and other contingencies, and that the plaintiffs were required to see to the efficiency of the carriages before they allowed their horses or live stock to be placed therein." Nothing turned on the efficiency of the carriages in the present case. "And that the defendants would not be responsible for any alleged defects in their carriages or trucks unless complaint was made at the time of booking or before the same left the station." Nothing turned on that in the case before the Court of Common Pleas. "Nor for any damage, however caused, to horse, cattle, or live stock of any description, travelling upon the said railways or in the defendants' vehicles." For the purpose therefore of the decision of the Common Pleas, the notice on the ticket there was as nearly as possible the same as here. In that case the accident occurred in consequence of the wheels of the carriage not being properly greased, and the court held that the plaintiff had taken on himself all risks from that source. So here, where the injury was occasioned by one carriage striking against another in the course of the conveyance, the plaintiff has by his express contract taken the risk. It is not for us to fritter away that contract and take away the plain sense and meaning of it, because the effect of our deciding otherwise may be to make carriers less careful. If contracts of this kind are wrong in themselves, it is not for us to rectify the mischief by putting an erroneous construction upon them: it is for the legislature to interfere if they think proper. Doing therefore ordinary justice between these parties — to the carrier on the one hand and the plaintiff on the other, the plain construction of this contract is that I have stated.

Alderson, B. — The defendants have undertaken to carry this horse on terms. What are they? — for it is clear that the Carriers' Act does not prohibit the making such a contract as the present. They have undertaken, then, to carry the plaintiff's horse, and they must do it: he on the other side taking on himself all the risks of conveyance whatever. It might fairly be argued, that from the whole of this notice taken together, the breach of duty must be such as causes injury or damage to the thing conveyed. That will not affect our decision here, though it might raise a question if the horse had been stolen; for

although that would be a risk of conveyance, still it would not be one resulting in damage to the thing or animal conveyed. Here, however, there was injury to the horse conveyed: in which case the defendants have contracted that they are not to be responsible. Such is the plain construction of the agreement between the parties.

Platt, B. — The gravamen of this declaration clearly is, that the defendants were guilty of gross negligence: and the question therefore is, Do the terms on which they receive this horse exonerate them from its consequences? My Brother Parke has most properly pointed out that this is a new subject of conveyance introduced since railways have been established, and that formerly horses and other animals were seldom carried by carriers. But they are conveyed so now in consequence of the speed with which railway trains travel, and their containing conveniences for conveying animals on trucks. It is consequently observed that new stipulations are made, and it is very just there should. Animals may be alarmed or bruised during the journey, though the carrier does every thing he can to insure their safe conveyance. There may certainly be a difficulty in distinguishing from what cause the injury to the animal may arise; but unless you can get rid of all the old cases on this subject, we must hold that the language of this ticket absolves the carriers, and allows them exemption from the consequences of gross misconduct. I am very much startled at that proposition. I do not, however, say that I take a right view of this matter. The four judges of the Court of Common Pleas are of a different opinion, and are supported by the authority of the old cases. Still I think it my duty to express the opinion I have done, as I am not by any means satisfied that the language of this ticket absolves the company from this action. The owner never dreamt of such a thing when he signed the ticket. He made a contract by that ticket to absolve them from all risks of carriage, which means all risks of conveyance; but if a carriage is standing at a station, and by the gross negligence of servants of the company a train runs into it, the cause of the mischief there is a matter which has nothing to do with the conveyance, though happening in the course of it. The ticket says that the company are not to be responsible for the safety of "live stock of any description travelling," *i. e.* in a state of locomotion on their line. With ordinary care a carriage may break, or a

collision may take place with another carriage, but gross negligence is a different thing. I retain the opinion I have expressed, but shall not oppose the other members of the court in arresting the judgment in this case.

MARTIN, B. — I agree with my Brothers Parke and Alderson. This horse was taken charge of by the defendants on certain conditions set out in this declaration — at all events the plaintiff is estopped from saying otherwise. As against him it must be taken that he agreed that the horse was to be carried on the terms of the notice there mentioned. It is clear that by the common law carriers might enter into special contracts as to the conveyance of goods, though bound as carriers to undertake the conveyance of them. But the Carriers' Act sets that question at rest, for it says they may enter into such. Now if they enter into such a contract as this, and in writing too, we must see what the contract is: for if illegal it is of course not binding. It is clear they may contract or not to be liable for gross negligence. As insurers they are answerable for the gross negligence of themselves or their servants, and if it is competent for a party to make himself answerable for gross negligence, he surely may contract that he shall not be liable for it. If that be so, it is impossible to use language to carry out the intention of the parties more clearly than the language of this ticket. I cannot answer for what passed in the mind of the owner of the horse when he assented to it, but it really does seem to me that if the parties were desirous of preparing a contract with the view of relieving a defendant from the consequence of gross negligence, they could not have framed one more apt than the present: and I am bound to carry out the meaning of the parties as expressed by the written document. As to inconveniences that may result from contracts, it is for the parties to judge of that, the sole province of a court of law being to carry out the contract: though in certain cases perhaps inconvenience might be taken into consideration in order to ascertain its meaning. I admit that from the construction we are now putting on this contract, a great temptation to carelessness may arise to railway servants carrying valuable articles, by their not being responsible even for gross negligence. But look at the other side. If they are to be responsible, notwithstanding such a provision as is contained in this notice, it must be familiar to every person conversant with the law

of this country that the company would be insurers; and any person who knows how facts are tried by the law of this country can imagine the consequences of that. There are therefore inconveniences both ways: although I protest against inconvenience being the test at all, and that it is for parties themselves to enter into their own contracts. My judgment is founded on the belief that the true construction of this notice is, that the defendants are not to be responsible for any damage to this horse from any peril of carriage, and that the mode in which the injury is described in the declaration is a peril of carriage. — *Rule absolute.*

Abstracts of Recent American Decisions.

New York Court of Appeals, July 13, 1853.[1]

Agreement — Breach — Damages. In December, 1846, the defendant agreed to convey twelve thousand bushels of corn for the plaintiff, in the packet-ship Yorkshire, to sail on 16th January following, from New York to Liverpool, for the price of sixteen pence sterling per bushel. The defendant afterwards refused to perform the contract; and this action was brought to recover damages for the breach of such contract.

It was proved that before the sailing of the Yorkshire, freight rose to nineteen pence sterling per bushel. It was not proved that the plaintiff had any corn to ship, or that he offered to ship any, by the Yorkshire, and on this ground the judge charged the jury that the plaintiff was entitled to only nominal damages, and the jury found accordingly.

But on appeal to this court, it was *held*, that the judgment should be reversed, and a new trial had, on the ground that the plaintiff was entitled to recover the difference between the price of the freight agreed upon, and the price at the time when the ship was to receive the corn; that the refusal of the defendant excused the plaintiff from offering the corn, and that it was not necessary for him to prove that he had it on hand.— *Ogden* v. *Marshall.*

Agreement — Receipt — Construction — Parol Evidence. This action was brought to recover damages done to the plaintiff by the overturning of a stage-coach, owned by the defendant, in which the plaintiff was passenger. About four weeks after the injury the defendant paid the plaintiff forty dollars, and she executed a receipt, of which the following is a copy.

"Received, Brookfield, July 11, 1849, of Wm. D. Knapp, forty dollars, in full for damages done to us by the stage accident of the 13th June last. Maria L. Coon. Caroline Coon."

In the court below, parol evidence was admitted for the purpose of explaining the receipt, the defendant excepting to the decision admitting it. The evidence was in substance that the plaintiff, at the time of executing the receipt, said to the defendant, that if she got well so that she could

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[1] Made up from reports in the New York Evening Post.

walk in three months from the time of the injury, she would be satisfied, if not, she should not; and the judge charged the jury that the receipt upon its face constituted a perfect defence, and should be so held unless the plaintiff had succeeded in showing by the parol evidence that there was a condition annexed to the receipt, which did not appear in the receipt itself. The jury rendered a verdict in favor of the plaintiff.

On appeal to this court, it was *held*, that a new trial should be had, because that, in the absence of fraud, parol evidence was not competent to contradict or vary the written instrument introduced by the defendant; that the instrument in question was not a mere receipt, but was an agreement, by which the damages, otherwise uncertain, to which the plaintiff was entitled, were liquidated and settled. — *Coon* v. *Knapp*.

Bill of Exchange — Agreement to Accept — Construction — Ratification — Burden of Proof. In July, 1846, the plaintiffs sold goods in New York to the amount of four hundred dollars and upwards, to William G. Sandford, of Wisconsin. After that time there were negotiations between Sandford and James L. Palmer, a son of the defendant, in relation to the formation of a copartnership between them, but no such copartnership was ever finally agreed upon. During those negotiations the defendant promised to let his son have two thousand dollars to go into business with, and as he had not then the money, he authorized the son to accept a draft drawn on him at not less than thirty days. In October, 1846, Sandford and James L. Palmer were at the plaintiffs' store in New York, and Sandford there drew upon the defendant, in favor of the plaintiffs, a draft at ninety days, for the amount of the July purchase by Sandford, which was accepted by James L. Palmer for the defendant. On that acceptance this suit was brought.

Upon the trial in the court below, wherein the plaintiff obtained judgment, it was proved by Sandford that in the November after the draft was drawn, he had a conversation with the defendant at Buffalo respecting the draft in suit, and other drafts which had been drawn in New York and accepted by James L. Palmer for the defendant, and in that conversation the defendant stated that he had given James L. authority to accept for him in the manner he did. It did not appear that the defendant had at that time any notice that the acceptance in question was given in payment of a debt of Sandford.

Upon appeal, this court reversed the judgment and ordered a new trial; *holding* that the authority given to James L. Palmer to accept for the defendant, only authorized him to accept on account of the firm about to be formed, or to raise money to enable him to go into business, and did not authorize him to accept the draft to pay a prior debt of Sandford; that the subsequent ratification attempted to be proved, was not sufficient to bind the defendant, because it was not shown that the defendant knew for what purpose the acceptance was given; that the burden of proof, with regard to that fact, rested upon the plaintiffs, who relied upon the ratification. — *Nixon et al.* v. *Palmer*.

Bill of Exchange — Indorsement — Evidence — Waiver of Notice by an Indorsee found incapable of managing his affairs, invalid — The Inquisition conclusive evidence of the incapacity. This was an action originally commenced against James N. Sherman, (the defendant's testator,) as indorser of a bill of exchange, of which the plaintiff appeared to be a *bonâ fide* holder. The bill was drawn upon George L. Davis by one Wilder, payable to his own order, and indorsed by him and the defendant Sherman, on the 9th of July, 1845, (the date of the draft,) payable six months from date. By an inquisition taken on the 31st December, 1845, under a commission issued by the Court of Chancery, it was found that Sherman then

was, and had been since the 1st day of July previous, in consequence of habitual drunkenness, of unsound mind, and incapable of conducting his own affairs, or of governing himself or his property. In February following, the inquisition was filed and a committee of the person and estate of said Sherman was appointed by the Court of Chancery, which continued in force until his decease. On the trial, after proving the handwriting of the maker, indorsers, and acceptor of the bill, the plaintiff produced a paper signed by the acceptor and indorsers, dated January 5, 1846, waiving notice of non-payment and protest of the draft.

The Supreme Court gave judgment for the defendants, on the ground that Sherman, after being found an habitual drunkard, had no power to waive demand and notice of non-payment of the draft; and they also held that evidence, which was offered by the plaintiff, that Sherman, at the time of executing the waiver, was perfectly sober and competent to transact business, was properly rejected.

The judgment of the Supreme Court was affirmed by this court, on the ground that the inquisition was conclusive evidence of the incapacity of the drunkard, to dispose of his property, or to make contracts, from the time when it was found.

There was no evidence that the plaintiff had any actual notice of the condition of Sherman, or of the inquisition. — *Wadsworth* v. *Sharpsteen et al. Executors, &c.*

Common Carriers by Canal — Liability of the Owners of a Chartered Boat to the Person contracting with the Charterers — Bankruptcy — Discharge. The plaintiff, in September, 1851, at New York, contracted with Chase & Co. to carry himself and a box of goods from New York to Buffalo. When the plaintiff with his box arrived at Albany, Chase & Co. having no boat then in port chartered the boat "Brilliant" of the defendants, who were proprietors of a line of canal boats running between Albany and Buffalo, and who agreed to tow and run the boat to Buffalo, Chase & Co. to load and have her earnings that trip for sixty-five dollars. There was no change of hands, and the sign of the defendants' line was kept suspended at the side of the boat. The plaintiff went as a passenger on this boat, and had on board the box in question, at his departure from Albany, but on his arrival at Buffalo it could not be found. And he thereupon brought this action against the defendants as common carriers for damages for the loss of the box and contents.

The defendant, Perkins, pleaded the general issue, and gave notice, in accordance with the statute of New York, of a discharge obtained by him under the United States Bankrupt Act of 1841. The discharge was objected to, on the ground that the bankrupt act provided only that such discharge might be "*pleaded*," and that giving notice was not pleading it, and that it could not discharge a demand of the nature of the one in question. The discharge was sustained by the Supreme Court, and judgment was rendered in favor of the other defendants on the ground that they were not liable to the plaintiff as common carriers. The Court of Appeals affirmed the judgment, as to the discharge of Perkins, and reversed it as to the other defendants, holding that they were liable to the plaintiff as common carriers, notwithstanding there was no privity of contract between them and the plaintiff; that they had a duty to perform as common carriers, and were liable to the party injured through a failure to perform that duty. — *Campbell* v. *Perkins, Rich et al.*

Equity — Bill to Enforce an Equitable Mortgage — Parties — Practice. On the 9th of April, 1845, one Crandall, holding a contract for the sale to him by Goold Hoyt, of two hundred and forty-eight acres of land, made an assignment to the plaintiff of the contract to the extent of one hundred

acres of the land, as a mortgage, to secure the payment of $893.70 within three years from that date. The assignment was indorsed on the contract.

In March, 1846, Crandall assigned his interest in the contract to the defendant Cross, who, in August, 1846, surrendered the contract, and received a new contract in his own name for the purchase of the whole two hundred and forty-eight acres, from Henry R. Remsen, in whom the title then was for $553·83, (the amount due on the Crandall contract,) payable, $96.64 immediately, and the residue in six annual instalments thereafter.

In April, 1847, Cross sold and assigned his interest to Griffith. Cross and Griffith, at the times of their purchases, and Remsen at the time of the surrender of the Crandall contract, and the execution of the contract to Cross, had notice of the plaintiff's rights. Cross and Griffith, under the contract from Remsen, claimed to hold the whole two hundred and forty-eight acres discharged of the plaintiff's claim. And the plaintiff in August, 1849, brought his bill to establish his rights to the one hundred acres, and to restrain the defendants from transferring the same.

A decree was made at Special Term in August, 1848, in favor of the plaintiff, declaring his rights, and directing an assignment by the defendants to him of their interest under the contract in the one hundred acres on which he had a lien, unless they should pay him the amount of his debt within thirty days, which decree was revised by the General Term, and the bill dismissed.

On appeal from the last mentioned decree to this court, it was *held*, that the plaintiff had an equitable interest as mortgagee, in the one hundred acres, and that he might properly file a bill before the debt became due, to protect his interest and prevent any transfer to a *bonâ fide* purchaser; that it was proper for him to ask such relief as might become proper by lapse of time before any decree could be made; that in making a decree after the debt became due, in order to avoid the necessity of another suit, it was right to provide for the satisfaction of the debt.

But that Remsen was a necessary party, and no final decree could be made in the present condition of the suit, and the decrees made at the general and special terms were therefore reversed, and the cause remitted, with directions to the plaintiff to make Remsen a party. — *Northrup* v. *Cross & Griffith.*

Evidence — Deposition — Statute, Effect of Repeal of. This was an action brought to recover the value of a box of goods shipped at New York for Chicago, in November, 1847. The defendant was the proprietor of the "Troy and Ohio line," a line of boats engaged in the transportation of goods from New York up the North River, and west. The box was taken to the office of the "Troy and Ohio line" in New York, and the man having charge of the office, went with the plaintiff's agent, who had the box, on board one of the defendant's boats, where the following receipt was given: "Received, New York, November 4, 1847, on old line towboat Abbott, in good order, one box mdse. marked W. W. Danenhower, Chicago, Ill. Care Neely, Lawrence & Co. Haviland." It was proved, after the receipt had been read, but not before, that Haviland was an agent of the defendant. The reading of the receipt was objected to, and the objection overruled.

Evidence was then offered of conversations between the plaintiff's and defendant's agents, shortly before the delivery of the box, as to the probability of its reaching Chicago before the close of navigation. This was objected to by the defendant, and the objection overruled. It was then proved that the box did not reach Chicago until the spring of 1848; and

when it arrived it was in a broken condition, and the goods badly damaged; that the consignees refused to receive it, and it was brought back to New York; that before its arrival, the plaintiff's agent called on the defendant's agent in New York, and made inquiries with regard to it, and was told that it "must have been delayed on the road somewhere; must have been packed away in some store-house, and stowed away under other goods and left," and the agent promised to write to the defendant (who resides at Troy) about it. This evidence was objected to, and the objection overruled.

A motion for a nonsuit was denied. The defendant offered to read certain depositions taken by a referee under the act of 1848, before its repeal. This was objected to by the plaintiff's counsel, on the ground that the statute under which the depositions were taken, had been repealed, and that there was no statute in force authorizing them to be read. The objection was sustained, and the depositions excluded. The plaintiff obtained judgment.

The Court of Appeals affirmed the judgment, holding that the several rulings which were excepted to, were correct; that the proof of the agency of Haviland after the receipt was read, cured any error there might have been in the previous admission. — *McCotter* v. *Hooker*.

Evidence — Ownership of Vessel proved by Copies from the Registry, when Originals are Lost — Presumption — Set-off. This action was brought by the public administrator of James Simon, deceased, for freight earned by the schooner Sir Lionel Smith, of which Simon in his lifetime was master, and claimed to be owner.

In September, 1842, the vessel received at Jamaica certain goods for the defendant in New York, to which port she was bound. Captain Simon died on the voyage; the mate succeeded to the command, delivered the goods to the defendant in New York, and this action was brought for the freight.

The evidence of the ownership of the vessel by Simon, consisted of the deposition of John Roby, collector of customs at Montigo Bay, in Jamaica, taken by commission, who stated that in April, 1842, he knew the schooner in question, and that she was then registered by him, and was the sole property of James Simon, of Montigo Bay, master mariner. That she was registered by virtue of a bill of sale, dated 17th March, 1842, from Duncan Robertson, executor of Robert Watt, deceased, to said James Simon, when the former certificate of registry, granted at the same port on the 7th February, 1839, Robert Watt, of Montigo Bay, being sole owner, was given up and cancelled. A copy of the several certificates of registry was annexed to the deposition.

It was proved that the vessel was lost in November, 1841, with all her papers on board. The admission of the deposition and papers annexed, as evidence, was objected to, on the ground that they were not competent evidence of the facts referred to by the witness, and that the documents annexed were copies and not originals, and that the bill of sale should have been produced. The objection was overruled and the papers read.

The defendant then offered to prove a set-off, which existed against the intestate prior to his decease; this was objected to and excluded, and the plaintiff obtained judgment for the amount of the freight.

The judgment was affirmed, this court holding that the evidence of the ownership of Simon was sufficient; that the bill of sale must be presumed to have been lost with the vessel's papers; that the freight did not become due until after the death of the intestate, and a set-off of a debt owing by him prior to his death was properly rejected. — *Ketchum, Public Administrator* v. *Miln*, ——.

Evidence — Presumption. This was an action to foreclose a mortgage for $500, dated June 22, 1842, given by the defendant, Swezey, to James C. Reeve, and by him assigned to the plaintiff. The defendant alleged in defence, that the mortgagee took and received $50 over and above the legal rate of interest for $450, which was all that the mortgagee ever paid, or that the defendant ever received for the mortgage.

The cause was tried before a jury, and on the trial the defendant, to sustain his answer, offered to give evidence of the declarations of the mortgagee, made while he was the owner of the mortgage. This evidence was objected to and excluded.

After the judge had delivered his charge to the jury, the defendant's counsel requested him to charge them "That if they found that, at the time of the delivery of the bond and mortgage, Reeve did intentionally withhold $50, it was evidence, unexplained, of a corrupt and usurious agreement." The judge declined so to charge, but instead thereof, charged them that the presumption was in favor of the legality of the transaction. "To which refusal, and to the whole of the charge, the defendant's counsel excepted." The jury found in favor of the plaintiff.

In this court upon appeal it was *held*, that evidence of the declarations of the mortgagee was properly excluded; that the exception to the affirmative part of the charge of the judge was too general to raise any question for review; that his refusal to charge as requested, was correct; that the intentional withholding of $50, by the mortgagee, unexplained, was not necessarily evidence of a corrupt and usurious agreement; that the law will not presume an unlawful agreement, from a fact which is equally consistent with a lawful purpose; that it was for the jury to determine the purpose for which the $50 was withheld, if withheld at all. — *Booth* v. *Swezey et al.*

Insurance, Life — Construction of Policy — Suicide by the Insured, when Insane, does not avoid the Policy. This was an action by the plaintiffs who were the administrators of Hiram Comfort, deceased, to recover the amount of a policy of insurance upon his life, made by defendants, which was in force at the time of his death.

The policy contained a provision, "That in case the said Hiram Comfort shall" [without previous consent, &c.,] "enter into any military or naval service, or in case he shall die by his own hands, or in consequence of a duel, or by the hands of justice, or in the known violation of any law of these States, or of the United States," &c., "this policy shall be void." The defendants insisted that the assured died by his own hand, within the meaning of the policy.

The referees, before whom the cause was tried, reported, "That the said assured, threw himself into the Hudson River, from the steamboat Erie, while insane, for the purpose of drowning himself, not being mentally capable at the time of distinguishing between right and wrong." The Supreme Court on this report, gave judgment for the plaintiffs, and the judgment was affirmed by this court. — *Breasted et al. Administrators* v. *The Farmers' Loan and Trust Co.*

Insurance — Insurable Interest — Parol Evidence. On the 1st September, 1848 the defendants made a policy of insurance against fire, to Joseph A. Slamm, for $3,000 for one year on a hotel owned by him. On the 4th of September, 1848, Slamm, on a deed absolute on its face, conveyed the hotel to the plaintiff Hodges. The conveyance was intended as security for a loan made by the plaintiff to Slamm, but such intention was not manifested by any writing. At the same time, Slamm assigned the policy of insurance to Hodges "as collateral security," and the assent of the defendants was given to such assignment. The hotel was destroyed by

fire, and this suit was brought to recover the loss, and a verdict was found and judgment rendered for the plaintiff.

It was insisted in this court on behalf of the defendants, that Slamm, having conveyed the insured premises by an absolute deed, had ceased to have an insurable interest, and the policy had therefore become void; that he retained no equity of redemption in the property, as he could not be permitted on a bill filed to redeem, to show by parol evidence that the deed was intended as a mortgage. But it was *held*, that Slamm had an insurable interest, notwithstanding the conveyance; that parol evidence was competent in equity to show that a deed absolute on its face was intended as a mortgage.

The judge on the trial, in the court below, allowed the plaintiff to amend the complaint, by adding to the allegation that Slamm had conveyed the property to him, a statement that such conveyance was intended as security for his indebtedness. Exception was taken to this, but it was *held* to be a matter of discretion, and not subject to review by the Court of Appeals. — *Hodges* v. *The Tennessee Marine and Fire Insurance Company.*

Insurance — Policy — Written Words control printed — Authority of Agent. This was an action upon a policy of insurance, made by the defendants, a corporation created by the State of New Jersey, and transacting business in the city of New York by an agency in the latter city, upon the brig Tremont "*for and during the term of twelve calendar months, commencing on the fifth day of October*, 1843, *at noon, each passage subject to its own average; . . .* beginning the adventure at and from as aforesaid, and so shall continue and endure, until the said vessel be safely arrived at as aforesaid, and until she be moored twenty-and-four hours in good safety." The words in the above extract from the policy which are italicised, were in writing, the other words were printed.

The policy was originally procured through the agency of L. Gregory, who acted as agent for the defendants in New York. It was proved that in April, 1844, Mr. Gregory was written to by the President of the insurance company, who referred to the fact of Mr. Gregory's having been elected president of a new insurance company, and said, "I infer from the nature of the appointment that any business that you may hereafter do as our agent, must be in reinsurances," and directing him "to decline to insure on any vessels until further instructions."

A committee, which had been previously appointed, with power "to make such arrangement with regard to Mr. Gregory's agency as they should deem advisable," submitted a report to the Board of Directors, on the 7th of August, 1844, in which it was stated that they had had interviews with Mr. Gregory, which resulted in an understanding that no new policies of insurance should be issued by him, and that the agency be closed up as soon as circumstances would permit it. Also, "That Mr. Gregory may receive applications for insurance, to be submitted to this office for approval, and may make these applications binding until our disapproval is communicated to the insured." This report was entered in the minutes of the board.

On the first day of October, 1844, application was made to Mr. Gregory by Mr. Walsh, in behalf of the plaintiff, to continue the insurance until the arrival of the vesel. Mr. Gregory at first declined, stating that he did not think he had authority, but would write to the company and get their permission to extend it. Mr. Walsh said it was not necessary for him to write, as he thought he had full power to extend it. Mr. Gregory finally said he would do it, and indorsed upon the policy the following memorandum: "It is agreed that this policy shall continue until the arrival of

the vessel at Boston from Cuba, on her present voyage; *pro rata* premium to be paid for time used after the 5th Oct. instant, at noon. New York, 1st Oct. 1844. L. Gregory, Agent."

Mr. Walsh had, in the month of June previous, applied to this company to extend a policy on another vessel, and received a letter in reply, stating, "You are aware that this company some time ago discontinued writing on vessels, and we have since declined all applications of that kind. We must, therefore, decline renewing the policy on ship Monument, or extending the time beyond the expiration of the present policy." This policy was one which emanated directly from the company, and not through the agency of Mr. Gregory.

Mr. Gregory entered the extended risk on the Tremont in the books of his agency, but neglected, in consequence of other engagements, to communicate it immediately to the company. The vessel was lost on the 7th of October, before her arrival at Boston, on the voyage from Cuba.

The plaintiff was nonsuited in the court below, on the ground that the original policy was a time, and not a voyage or mixed policy, and expired on the 5th of October; that the written words controlled those which were printed; also, that Gregory had not authority to extend it.

This court sustained the ruling of the Supreme Court in regard to the construction of the policy, but held that the extension of it by Gregory was binding on the company, and on that ground ordered a new trial. — *Leeds* v. *The Mechanics' Ins. Co. of Newark.*

Landlord and Tenant — Covenant to purchase Improvements at the Expiration of the Term. On the first of May, 1836, the Poughkeepsie Silk Company leased certain premises owned by them, to Hewitt, for ten years, and covenanted that if, at the expiration of the lease, the parties should not agree to renew it, "then the said company bind themselves, their successors and assigns, to purchase and receive from Hewitt all and any improvements which shall be put and placed on said premises by him during the term," the value to be fixed by persons chosen by the parties, &c.

Hewitt erected buildings on the premises which he occupied five years, when he assigned his lease to the plaintiff, who occupied to the end of the term, paying the rent to the lessors. On the first of May, 1846, the plaintiff demanded of the Company the performance of the covenant, the appraisal and purchase of buildings, which they refused.

In March, 1847, the premises were sold on the foreclosure of a mortgage executed by the Company after the commencement of the term, and the defendant became the purchaser. The defendant was notified of the lease, and of the plaintiff's claims under it prior to his purchase. The mortgagee had notice of the lease at the time of taking the mortgage, the plaintiff was in possession of the premises at the commencement of the foreclosure, but was not made party to the proceedings. This action was brought to recover of the defendant the value of the buildings erected by Hewitt on the demised premises during the term.

Held, that although the covenant in question might run with the land and bind the assignee of the reversion, the assigns of the lessors being expressly named in the covenant, yet, that it did not run with the land after the covenant was broken; and that as such breach occurred upon the refusal of the Silk Company to comply with the demand made of them at the expiration of the lease, nearly a year before the defendant became the purchaser of the premises, this action could not be sustained. — *Coffin* v. *Tallman.*

Landlord and Tenant — Destruction of Premises by Fire before commencement of Term — Bill to reform Lease for mistake in omitting a Covenant therein previously agreed on. In November, 1843, a lease was executed by the parties to this suit, by which the defendants demised to

the plaintiff a tavern in the city of Rochester, for the term of eight years, from April 1, 1844, when the term was to commence, at an annual rent of $ 1,000, payable quarterly. In February, before the commencement of the term, and before the lessee took possession, the tavern was destroyed by fire. The lessee then requested the lessors to cancel the lease, which they refused to do, and in September, 1844, they commenced an action of covenant on the lease, to collect one quarter's rent, which they alleged had become due.

The plaintiff then filed a bill before the Vice-Chancellor of the eighth circuit, alleging that by the terms of the agreement between the parties, the lease was to have contained a provision, that in case the tavern should be destroyed by fire during the term, the obligation to pay rent should be cancelled, and the term should cease. That such provision was omitted by mistake, and praying that the lease should be reformed and cancelled, and the defendants perpetually enjoined against prosecuting the suit for rent. The Vice-Chancellor dismissed the bill, on the ground that the proof did not satisfactorily show that the parties had agreed that the lease should contain the provision alleged to have been omitted.

The Supreme Court, on appeal, concurred with the Vice-Chancellor as to the insufficiency of the proof, but reversed his decree, and ordered the lease to be cancelled, and enjoined the defendants from the further prosecution of the action on the covenant, on the ground that the destruction of the demised property by fire, before the commencement of the term, entitled the lessee to have the lease cancelled, without any special agreement to that effect.

The Court of Appeals, without passing upon the question of law last suggested, affirmed the judgment, on the ground that there was sufficient evidence of the agreement that the term should cease, in case of the destruction of the building by fire, and of the omission, through mistake, to insert such provision in the lease. — *Wood* v. *Hubbell et al.*

Limitations, Statute of — Admissions to take the Demand out of Statute. The firm of Thomas H. Smith & Son, composed of Thomas H. Smith and George W. Bruen, on the 21st of June, 1828, made a promissory note in favor of Thomas Bloodgood, (the plaintiff's testator,) for $ 10,360.11, payable ninety days after date, and falling due September 22, 1828. On the twenty-third of September, 1828, Thomas H. Smith died, leaving a will appointing his copartner, G. W. Bruen, executor, who received letters testamentary, and acted as executor until October, 1846, when he was removed, and the now defendant, Herman Bruen, appointed in his stead.

The bill in this cause was filed in August, 1845, against George W. Bruen, the then executor, to collect the amount due on the above note. To meet the defence of the statute of limitations, it was alleged in the bill, "That George W. Bruen has on repeated occasions, and to divers persons, since the date of said promissory note, admitted that the amount thereof, with interest thereupon, remained due and unpaid, and promised to pay the same;" and it was specially alleged, that in an answer in Chancery, in the suit of *James Iddings, receiver, &c.*, v. *George W. Bruen and others*, sworn to June 18, 1842, by George W. Bruen, he made such admissions.

The defendant, Herman Bruen, who was made a party after his appointment as executor, set up in his answer the defence of the statute of limitations. The cause was transferred to the Superior Court, where a decree was made in favor of the complainant, for the amount of the note and interest.

But on appeal to this court, it was *held*, that the decree should be re-

versed and the bill dismissed, on the ground that there was nothing shown in the case to prevent the statute of limitations from operating as a bar to the claim; that the general allegations of repeated acknowledgments by G. W. Bruen, since the date of the note, must be disregarded for want of certainty, it not appearing when, or to whom, they were made, or whether within the period of the statute of limitations or not; that Bruen, as surviving partner, could not make such an admission of promise as would revive the debt against the estate of his deceased copartner; that the admission in the answer to the bill of Iddings was not sufficient to revive the claim, for the reasons: — 1st. That it was not made to the creditor or any one representing him, but to a stranger; 2d. The admission was not voluntary. George W. Bruen was made a witness by Iddings, the trustee of his creditor, and compelled to testify. An admission obtained in this way cannot be made the foundation of a new promise; 3d. The admission was not made by Bruen in his character as executor, nor is it so charged in the bill; 4th. If the admission was made by him in his character of executor, it would not bind the estate of the testator. If he could bind the estate in any manner, it could only be by a positive contract. — *Bloodgood, Executor*, v. *Bruen, Executor, &c.*

School Act (New York) of 1849 *Invalid, because submitted to the People for Approval.* This was an action against the defendants for wrongfully taking the plaintiff's wagon.

The defendants, in their answer, justified the taking by them, as trustees of a school district, for a tax voted by the district in pursuance of the act to establish free schools, passed March 26, 1849. The plaintiff, in his replication, denied the validity of the act, on the ground that it was not duly passed by the legislature, it having been submitted to the electors to determine by their votes whether it should become a law.

The jury, at the trial in September, 1850, returned a special verdict, fixing the value of the property taken, but not finding any other fact. Judgment was rendered upon this verdict for the plaintiff, and the General Term affirmed the same.

On appeal to this court, it was *held*, that the court must pass upon the case as presented by the pleadings and verdict, and if upon the facts so appearing a cause of action was not shown, the judgment should be reversed; that the act of March 26, 1849, for establishing free schools throughout the State, was not passed in accordance with the Constitution; that the legislature had no authority to refer to the electors of the State the question whether that act should become a law; nor had the electors power to determine that question; that when the people adopted the Constitution, they surrendered the power of making laws to the legislature, and imposed it upon that body as a duty; that they did not reserve to themselves the power of ratifying or adopting laws *proposed* by the legislature, excepting in the single case of contracting public debt. — *Barto* v. *Himrod et al.*

Supreme Judicial Court of Massachusetts.

AT CHAMBERS.

Injunction — Practice. This was a bill in equity, in which an injunction was prayed for to prevent the defendant from erecting a stable for more than four horses in Charlestown, under the provisions of the Act of May 24, 1851, (Stat. of 1851, ch. 319, § 1,) entitled "An Act relating to the erection and use of buildings for stables and bowling alleys," which Act had been adopted by the city council of Charlestown. Great consideration was bestowed upon the proper manner of bringing the bill, and

the mode finally adopted, at the suggestion of the court, was an information in the name of the prosecuting officer for the district, setting out the unauthorized erection of the stable. The respondent, in his answer, denied the intention of using the stable for more than four horses, and the bill was dismissed, Fletcher (Justice) stating that he would at any time grant an injunction against the defendant, upon proof of the use of the building for more than four horses. — *Commonwealth ex rel. A. W. Farr, District Attorney* v. *Downing.*

Injunction — Quo Warranto. This was an application under Statute 1852, chap. 312, § 42, for leave to file an information in the nature of a *quo warranto* against the respondents, and for an injunction to restrain them from proceeding with the construction of their road, until the further order of the court. The respondents' charter provided that the road should not be commenced until $100,000 had been subscribed by responsible parties, and that a certificate of that fact should be signed and sworn to by a majority of the directors and filed in the office of the Secretary of State. The petitioner charged that $55,000 was subscribed by one Cahill, who was not responsible. The respondents showed that the certificate above-named was signed and sworn to by a majority of the directors, and contended that the petitioner was not at liberty to go behind, but was concluded by, that certificate.

Merrick, J., without deciding the question of law, dismissed the petition, not being satisfied that Cahill was irresponsible. — *Swan* v. *Stoneham Branch Railroad.*

Notice of New Book.

A Treatise of the Law of Arbitration, &c. By James Staniford Caldwell. Second American, from the last English Edition, with Notes, and References to Late American and English Decisions, by Chauncey Smith. Burlington: Chauncey Goodrich. 1853.

We have here a new edition of Caldwell on Arbitration, a standard work upon an important department of the law, and one which is every year growing relatively more and more important. The English work, as it came from Mr. Caldwell twenty-five years since, was regarded as a great accession to the literature of the law. A thorough and reliable elementary book upon so important a subject, is always a good service. It is common to speak lightly of elementary learning and elementary books, and especially of the subordinate office of the mere annotator. But the mass of Reports is so vast, and the labor of examining them is daily becoming so desperate, and often so thankless, that one feels grateful to a diligent editor of a good law book. It is an humbler office, nominally at all events, than the writing a new book; and for that reason, as it is confessedly one of equal utility, it should perhaps be regarded with more commendation.

An old text-book brought down to our own day, by a careful digest of all the English cases and the most important American cases upon the subject, since the former publication, is always a desideratum and a service for which all good lawyers are grateful. We have examined this edition, with some care, and we think it will be found exceedingly useful, and a reliable book of reference. The notes are very extensive, and bating an occasional misprint, accurate and condensed. It is rather to be regretted, that in getting up a new edition of so important a book, with such extensive notes, the proof-sheets should not have been submitted to the editor.

It seems to us, too, that as an American edition of an English law book is not ordinarily expected to sell abroad, that the English statute, which comprises Chap. 10 "Of the Arbitration in the Cases of Masters and Workmen, and of Insolvent Debtors," and most of the English Precedents and Practical Forms, which occupy almost one hundred pages, and which are of no earthly use to an American lawyer, should have been omitted.

In other respects the edition is well got up, and is creditable, both to the editor and the publisher.

*** Several articles of Miscellaneous Intelligence, and a notice of Professor Greenleaf's Third Volume of Evidence, prepared for this number, are excluded for want of space.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Bailey, Uriah et al.	Newbury,	June 7,	John M. Williams.
Billings, Merrick H.	Greenfield,	" 25,	David Aiken.
Blaney, Samuel R.	Cambridge,	" 25,	Asa F. Lawrence.
Chamberlain, William N.	Dana,	" 17,	Charles Brimblecom.
Churchill, George	Boston,	" 7,	Charles Demond.
Clark, Hollis R. et al.	Worcester,	" 3,	Henry Chapin.
Clark, Nathaniel et al.	Worcester,	" 3,	Henry Chapin.
Conner, James R.	Charlestown,	" 15,	Asa F. Lawrence.
Crafts, Benjamin F.	Charlestown,	" 23,	Josiah Rutter.
Curtis, William H.	Stoughton,	" 10,	Samuel B. Noyes.
Dickerman, John D.	Cambridge,	" 22,	Josiah Rutter.
Farnsworth, Jerome	Harvard,	May 31,	Charles Mason.
Farrar, Ward B.	Fitchburg,	June 6,	Charles Mason.
Faxon, William T.	Cohasset,	May 6,	Francis Hilliard.
Fisher, Solon	Boston,	June 2,	John M. Williams.
Ford, Joseph E. et al.	Abington,	" 1,	Welcome Young.
French, Charles	Boston,	" 29,	Charles Demond.
Frye, Ira	Lowell,	" 27,	Isaac S. Morse.
Goodrich, Giles	Boston,	May 26,	John P. Putnam.
Graham, Lucius	Greenfield,	June 15,	David Aiken.
Greenleaf, Richard O.	Lawrence,	" 25,	N. H. Harmon.
Harris, Beriah	Coleraine,	" 25,	David Aiken.
Hill, Edmund	Upton,	" 29,	Charles Brimblecom.
Hill, John	Charlestown,	May 30,	John P. Putnam.
Holmes, Joseph T.	Roxbury,	June 30,	Charles Demond.
Holmes, Nathaniel	Boston,	" 11,	John P. Putnam.
Kegar, Samuel	Newburyport,	" 3,	N. H. Harmon.
Kidder, Albion et al.	Boston,	" 15,	John P. Putnam.
Kittredge, Daniel	Lowell,	" 13,	Isaac S. Morse.
Lauckton, Harmon	Worcester,	" 30,	Henry Chapin.
Maple, Zebedee	Worcester,	" 25,	Henry Chapin.
Merritt, Benjamin, Jr.	Boston,	" 7,	John M. Williams.
Moseley, Charles B.	Worcester,	" 30,	Henry Chapin.
Mundruca, Emiliano F. B.	Cambridge,	" 27,	John M. Williams.
Ockershausen, Frederick	Dorchester,	" 18,	Samuel B. Noyes.
Pike, Francis et al.	Boston,	" 15,	John P. Putnam.
Pratt, Isaac B. et al.	Abington,	" 1,	Welcome Young.
Richardson, Stephen B.	Pepperell,	" 8,	Isaac S. Morse.
Sayles, Caleb W.	Wrentham,	" 29,	Francis Hilliard.
Sears, Judah	Boston,	" 8,	Charles Demond.
Shepard, Ephraim	Walpole,	May 3,	Francis Hilliard.
Snow, Ambrose	Cambridge,	" 31,	Charles Demond.
Stetson, Lewis T. et al.	Randolph,	July 8,	Samuel B. Noyes.
Swett, Edmund	Boston,	June 7,	John M. Williams.
Thayer, Adoniram	Randolph,	" 23,	Samuel B. Noyes.
Thayer, Luther F.	Randolph,	" 22,	Samuel B. Noyes.
Thayer, William H. et al.	Randolph,	July 8,	Samuel B. Noyes.
Turner, George	Milton,	June 4,	Francis Hilliard.
Twist, Nathan H.	Danvers,	" 21,	John G. King.
Walker, Edward D.	Upton,	" 15,	Henry Chapin.
Whittier, Reuben T.	Milton,	" 4,	Francis Hilliard.
Wier, Robert	Boston,	" 3,	John M. Williams.

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During the winter vacation, the Library will be opened, for the use of those members of the School who may desire it.

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